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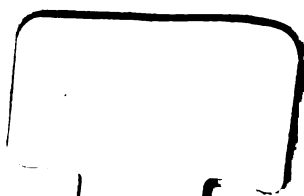
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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

TERMS OF JANUARY AND APRIL, 1922.

NEWTON C. GARBUTT, REPORTER.

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ASSOCIATE JUSTICES

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Hon. Morton S. Bailey *

Hon. George W. Allen

Hon. Haslett P. Burke

Hon. John H. Denison

Hon. Greeley W. Whitford.

Hon. John Campbell.†

* Deceased May 16, 1922.

† Appointed May 20, 1922, to fill the vacancy occasioned by the death of Hon. Morton S. Bailey. Elected for short term (4 years) November 7, 1922.

Victor E. Keyes, Attorney General.

James Perchard, Clerk of the Court.

Newton C. Garbutt, Reporter.

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Rules of the Supreme Court of the State of Colorado

PRACTICE AND PROCEDURE IN *NISI PRIUS* COURTS

1. ACTIONS—HOW COMMENCED.

Actions shall be commenced and summons issued and served as provided by the Code of Civil Procedure.

2. ALLEGATIONS IN ONE COUNT, ETC.—INCORPORATED IN OTHER COUNTS BY REFERENCES, ETC.

Allegations appearing in any count, defense or counterclaim need not be repeated but may be incorporated in other counts, defenses or counterclaims by reference. Any written instrument may be made a part of a pleading by attaching the same or a copy thereof thereto as an exhibit.

3. DOCKETING CAUSE WHEN PLACE OF TRIAL IS CHANGED—FAILURE TO DO SO—ORDER VACATED.

In case of change of place of trial of an action the party at whose instance such change is granted shall docket the cause in the court to which it was transferred within fifteen days after the receipt of the record by the clerk of such court. On failure to do so, the court ordering the change, on motion of the adverse party and notice to opposite counsel, with proof of such failure, shall set aside the order of transfer and shall thereupon be reinvested with full jurisdiction of the cause for all purposes, except where the change was ordered on account of the disqualification of the judge, in which instance a competent judge shall be secured to try the cause. The party at whose instance the place of trial was changed shall not be permitted to apply for another change upon the same ground.

4. MOTION TO QUASH PROCESS OR SERVICE—GENERAL APPEARANCE—EXEMPTIONS.

A motion to quash a summons or *scire facias* or service of either

shall, if overruled, be deemed a general appearance of the party making such motion. This rule shall not apply where the moving party claims exemption from service of process, nor to service of process on minors or persons judicially declared incapable of conducting their own affairs.

5. WHEN DISMISSAL ON NON-SUIT BARS ANOTHER ACTION.

The dismissal of an action upon the ground that the testimony does not establish the cause of action involved, or a judgment of non-suit for the same reason, is a final determination of the merits of such action, and bars a new action between the same parties or their privies on the same cause of action, unless the court shall dismiss or direct judgment of non-suit without prejudice.

6. RETRIAL MAY BE LIMITED TO SPECIFIC QUESTIONS OF FACT.

Upon a motion for a new trial, the court may, in its discretion, order a retrial of questions of fact with respect to which error was committed, without resubmission of those concerning which there has been no error.

7. INSTRUCTIONS—OBJECTIONS HOW MADE—REVIEW LIMITED TO SUCH OBJECTIONS.

Counsel shall present to the trial court, at or prior to the close of the evidence, such instructions as they may desire. The court shall afford respective counsel a reasonable time and opportunity to examine proposed instructions, whether requested, or to be given by the court of its own motion, and to prepare and present specific objections thereto before such instructions are given to the jury. On motion for new trial, or on review by the supreme court, only the grounds so specified shall be considered.

8. MOTION FOR NEW TRIAL—NECESSITY OF—EXCEPTION.

The party claiming error in the trial of any case must, unless otherwise ordered by the trial court, move that court for a new trial, and, without such order, only questions presented in such motion will be considered on review.

9. STAY OF EXECUTION—TERMS.

The trial court shall stay execution until the expiration of five days from the time of entry of judgment, and upon motion within said five days, or within the time of any extension, may grant a further stay pending application to the Supreme Court for a *supersedeas*. Upon granting the stay of five days, or any further stay, the trial court may prescribe terms or require security, or both. (See Rule 21.)

10. TRIAL COURT RECORD—ENLARGEMENT OF.

The record in the trial court may be enlarged or added to as provided in the Code of Civil Procedure. (See Code of Civil Procedure, Chapter 38, Revised Statutes of 1908.)

11. SERVICE OF NOTICE OF MOTION BY MAIL.

Service of notice may be by mail as prescribed in the Code of Civil Procedure, and when so served the time shall be increased above that to be given where service is personal, one day for every one hundred and twenty-five miles, or fraction thereof, between the place of deposit and the place of address. (See Chapter 37, Code of Civil Procedure, Revised Statutes of 1908.)

12. COURTS TO PROVIDE RULE FOR DISMISSAL OF ACTIONS.

Nisi prius courts shall by rule provide for the dismissal of actions not prosecuted or brought to trial with due diligence.

13. TRIAL COURTS—MAKE ADDITIONAL RULES—OWN PROCEDURE.

The *nisi prius* courts may make rules to govern their own procedure, not inconsistent with these rules or with law.

II.**PRACTICE AND PROCEDURE IN THE SUPREME COURT.****14. SESSIONS EN BANC AND IN DEPARTMENTS.**

The Chief Justice may convene the court *en banc* at any time, and shall do so on the written request of three Associate Justices. Subject to this provision, or as limited by the Constitution, sessions of the court in departments for the purpose of hearing oral arguments, and designation of the Justices to hear such arguments, shall be under the direction and control of the Chief Justice. In case of his absence or inability to act, such duties shall devolve upon the Justice who would next be entitled to become Chief Justice.

15. COURT—SPECIAL TERMS—NOTICE OF.

Special terms of court may be held at any time upon an order signed by at least four of the Justices of the court and filed in the office of the clerk at least fifteen days prior to the day appointed for such assembling of the court. The clerk, on receipt of such order, shall forthwith enter the same at length in the records of the court, and give notice of the appointment of such special term, and the day appointed therefor, in one or more newspapers published at the seat of government.

16. APPEARANCE AS AMICUS CURIAE.

An attorney of this court may appear as *amicus curiae* in any cause pending herein by request of the court, or by leave of court first had upon written application filed in said cause, setting forth the particular employment, relationship, or interest by reason whereof such leave is sought; and not otherwise.

17. WRIT OF ERROR—LIMITATION ONE YEAR—EXCEPTION—RECEIVER—TO REVIEW ORDER CONCERNING.

A writ of error shall not be brought after the expiration of one year from the rendition of the judgment complained of; but when a person thinking himself aggrieved by any judgment or decree that may be reviewed in the Supreme Court, shall be an infant, *non compos mentis*, or imprisoned when the same was rendered, the time of such disability shall be excluded from the computation of the said one year. (See 185 Pac. 351.)

An order appointing, or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver, may be reviewed on error, before final judgment, if prompt application for that purpose is made.

18. WRITS OF ERROR—SUPERSEDEAS—PROCESS ON WRITS OF ERROR.

Writs of error shall be directed to the clerk or keeper of the records of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court. In any case where a transcript of the record, duly certified to be full and complete, or an agreed record on error, has been filed or may be hereafter filed, in the office of the clerk of this court, before the issuance of a writ of error, it shall not be necessary, except in a case where a *supersedeas* may be allowed, to deliver such writ to the clerk of the inferior court; but the same may be filed in the office of the clerk of this court and such transcript or agreed record so filed with the clerk of this court shall be taken and considered to be a due return to said writ of error. In capital cases, in which a writ of error shall issue and be made to operate as a *supersedeas* to stay the execution of the judgment of the trial court, as provided by statute, such writ of error, and also the *scire facias* to hear the errors assigned, shall be made returnable forthwith. When a writ of error shall issue in a case where a *supersedeas* has been allowed after the filing of the record, and shall be served on the clerk of the inferior court, he shall return upon said writ that the same has been served upon him and that it appears by the endorsement thereon that a record has been filed in the office of the clerk of the Supreme Court.

19. SUMMONS TO HEAR ERRORS—SERVICE AND RETURN THEREOF—APPEARANCE.

A *scire facias* or summons to hear errors in civil cases, and criminal cases not capital, shall require the defendant in error to appear in obedience thereto within ten days after service thereof, and shall be returnable twenty days after the issuance thereof. The service thereof, when by publication, shall be complete upon the expiration of the last day of such publication.

20. SCIRE FACIAS—ALIAS OR PLURIES MAY ISSUE.

If a *scire facias*, or summons to hear errors, shall not be served, an *alias* or *pluries* may be issued without an order of court therefor.

21. STAY OF EXECUTION—REVIEW OF.

If either party considers his rights have been, or will be, prejudiced by any ruling or order of the trial court in respect to any application for a stay or further stay of execution under Rule 9, he may docket the case in the Supreme Court on error by filing a verified statement setting forth the nature of the cause of action, the judgment, rulings and other matters complained of, from which it appears the trial court has committed error to his prejudice, and the Supreme Court may order a stay or further stay of execution for such time and upon such terms and conditions as it may determine; and may make any order in the premises necessary to protect the rights of the parties. (See Rule 9 *supra*.)

22. SUPERSEDEAS—APPLICATION FOR—RECORD COMPLETE.

No *supersedeas* will be granted unless the record upon which the application is made be complete and duly certified by the clerk of the court below, with assignments of error appended thereto which assignments must be supported by a succinct printed or typewritten brief, filed with such application. Counsel for plaintiff in error shall serve upon defendant in error or his counsel a notice of such application and copy of his brief, who may within ten days thereafter file a brief in opposition, a copy of which shall be served upon counsel for plaintiff in error, who may reply thereto within five days. The application shall then stand submitted. No application for a *supersedeas* will be considered by the court, or by any Justice in vacation, unless the cause shall have been docketed.

Upon the docketing of the cause, as aforesaid, the sum of ten dollars shall be paid to the clerk, and upon the allowance of the writ, or upon further prosecution of the cause, an additional sum of ten dollars shall be advanced to the clerk.

23. SUPERSEDEAS—EFFECT OF.

When a writ of error shall be made a *supersedeas*, the clerk shall endorse upon said writ the following words: "The record in this cause having been filed in my office, with an order endorsed thereon that the writ of error herein be made a *supersedeas* according to law, this writ of error is therefore made a *supersedeas*, and shall operate accordingly"; which endorsement shall be signed by the clerk of this court.

24. WATER PRIORITIES—PROCEEDINGS ON REVIEW—ALIGNMENT OF PARTIES.

Any party suing out a writ of error to review the whole or any part of a decree entered in any statutory proceedings adjudicating water priorities or the change of points of diversion thereof, shall file in this court a petition, as plaintiff in error, showing the priority and ditch rights claimed by such party, and making the assignments of error a part of the petition by reference only, and naming the ditches, reservoirs, pipe lines and other works, and the owners thereof who may be adversely affected by such proceedings in this court as defendants in error, and such alignment of parties in this court shall be according to such petition, and writ of error issued accordingly.

25. EXECUTION—RECALL OF.

Whenever execution or other final process shall be issued upon a judgment at law or decree in equity, and the record of such judgment or decree shall be removed into this court by writ of error operating as a *supersedeas*, such writ of error may be served upon the officer in whose hands such execution may be, and thereupon all proceedings under such execution shall be discontinued, and such officer shall return the same into the court from which it was issued, together with the copy of the writ of error served on him, and shall set forth in his return to such execution what, if anything, he hath done in obedience to the command thereto.

Such service of the writ of error and *supersedeas* may be made by delivering to the officer having such final process for execution a copy of such writ of error and the endorsements thereon, with the certificate of the clerk of the Supreme Court, or of the clerk of the inferior court to whom the same is directed, that the same is a true and perfect copy of the original of such writ of error and the endorsements thereon.

26. BOND—POWER OF ATTORNEY FILED—EXCEPTION.

Whenever a bond is executed by an attorney in fact, the original power of attorney shall be filed with the bond in the office of the clerk of this court, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in ques-

tion; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

27. TRANSCRIPT OF RECORD—BILLS OF EXCEPTIONS.

Clerks of inferior courts in making up an authenticated copy of the record in civil cases, shall certify to this court so much of the record, arranged in chronological order, as the plaintiff in error may, by *praecipe*, indicate. If the record, so certified, shall be insufficient, it shall be perfected at his cost; and, if unnecessarily voluminous, the cost of the unnecessary parts shall be taxed against him. Carbon copies shall not be used in preparing the record. Bills of exceptions need not be copied but the original may be sent up.

28. RECORD ON ERROR—PARTIES MAY AGREE.

The parties to an action, after final judgment, may agree upon a record on error, which, when certified by the trial court, together with the assignment of errors, shall be certified by the clerk to the Supreme Court as the record on error.

29. TRANSCRIPT OF RECORD—ADDITIONAL—LEAVE TO FILE.

When a party to any cause pending in this court asks leave, without suggesting a diminution of record, to file an additional or supplemental transcript of the record, he shall give at least twenty-four hours' notice thereof to the opposite party. At the time of giving such notice the additional or supplemental transcript shall be deposited with the clerk of this court for the inspection of the opposite party. Such motion shall be submitted under Rule 11 *supra*, and, if leave is granted, the additional or supplemental transcript may be filed and considered in connection with the original transcript.

30. RECORD—BINDING.

The transcript or agreed record shall be bound in half sheep or cloth, with substantial paper sides, thirteen inches in length and eight and one-quarter inches in width, and shall be fully indexed.

31. ASSIGNMENT OF ERRORS.

Plaintiff in error shall assign errors in writing at the time of filing the record and each error shall be separately alleged and particularly specified; *Provided*, That when errors are assigned upon exceptions to the ruling of the court in the admission or rejection of evidence, which go to the same point, it shall be sufficient to refer to the folio numbers of the record where such rulings and exceptions appear without particularly specifying the evidence admitted or rejected.

When the error alleged is to the charge of the court, the part of the

charge referred to shall be quoted *totidem verbis* in the specifications; *Provided*, Where the charge is divided into separate paragraphs or instructions, which are each duly numbered, and error is assigned as to one or more entire paragraphs or instructions, it shall be sufficient to designate the part of the charge referred to by giving the number prefixed to each paragraph or instruction so assigned for error.

The same shall be signed by an attorney of the court.

If the defendant in error desires to assign cross-errors, he shall do so at the time he files his brief, as hereinafter provided; the assignment of error shall be in writing and signed by an attorney of this court.

32. ERRORS—FAILURE TO ASSIGN—WRIT DISMISSED.

If the plaintiff in error shall fail to assign error, the writ of error shall be dismissed.

33. JOINDER IN ERROR NOT REQUIRED—FILING BRIEF SUFFICIENT.

No formal joinder in error shall be required, but if the defendant in error shall not in any manner appear within the time allowed for filing brief in his behalf, the cause may be heard *ex parte* or the judgment or decree of the court below may, in the discretion of the court, be reversed without a hearing. (See Rule 19.)

34. DISCUSSION LIMITED—ERRORS STATED.

Counsel will be confined to a discussion of the errors stated, but the court may, in its discretion, notice any other error appearing of record.

35. ABSTRACT OF RECORD—CONTENTS.

Plaintiff in error shall within thirty days after the return day file with the clerk fifteen printed copies of an abstract of the record, except where application for supersedeas is pending, in which event the time shall be computed from the date of the determination of such application. Such abstract shall contain a brief statement of the contents of the pleadings, the judgment, the assignments of error relied on, and such other parts of the record as may be essential; but when for a proper understanding and determination of the questions raised it may be necessary, such matters may be stated fully or in the exact words of the record. If anything necessary to a determination of the case is omitted it may be supplied; defendant in error may, within the time allowed him for his brief, file fifteen copies of a supplemental abstract, and when the same is essential to a proper understanding of the case the cost thereof shall be charged to the plaintiff in error; otherwise, to him. The abstract shall be indexed and the folio numbers of the record shown on the margin thereof. It shall bear, on the front cover, the number and title of the case, the court to which the writ of error lies and the name of the trial judge.

36. ABSTRACTS AND BRIEFS—HOW PRINTED.

Abstracts and briefs shall be printed on blue, white wove, antique finish, book paper of a weight the basis of which shall be eighty pounds to the ream, 25 x 38 inches in size. They shall be printed on pages 9½ by 7½ inches when trimmed, in small pica type, leaded, face of type page 22x40 ems pica, so printed as to leave an inside margin of 1½ inches, and an outside side margin of 2⅝ inches, and a bottom margin of 2 inches. Extracts and quotations must be in the same type, either solid or indented, in the discretion of counsel. The number of the case in this court must be printed in large figures at the top of the outside cover.

37. BRIEFS—WHEN FILED—SERVICE ON OPPOSITE PARTY.

The brief of plaintiff in error shall set forth the propositions to be argued and the authorities in support thereof, and be filed within thirty days after the day fixed by rule for filing the abstract.

If it shall be filed in compliance with this rule, the defendant in error shall file his brief within thirty days after the expiration of the time for filing the brief of plaintiff in error.

Twenty days thereafter shall be allowed for the reply of plaintiff in error.

Fifteen copies of every brief shall be filed and two copies of every abstract and brief shall be served upon the opposing party or his counsel, if appearance shall have been entered. Proof of such service shall be filed with the clerk.

38. SUPPLEMENTAL BRIEFS—LIMITATION OF DISCUSSION—WHEN FILED.

Either party may, not less than ten days prior to the submission of a cause for final determination, file a supplemental brief and the opposite party may, within five days thereafter, file a brief in answer thereto. Such briefs shall be confined solely to the citation and discussion of new authorities upon the propositions covered in the original briefs.

39. ABSTRACT OR BRIEF—FAILURE TO FILE—EFFECT OF.

In case the plaintiff in error shall neglect to file an abstract and brief as required, or either of them, the opposite party may proceed *ex parte*, or the court may dismiss the writ of error without notice.

40. ABSTRACTS AND BRIEFS—TIME FOR FILING—EXTENDED OR ABRIDGED.

No stipulation or motion shall suspend the operation of the rules, but for good cause shown, the court, or a Justice thereof in vacation, may extend or abridge the time for filing the abstracts, briefs, or other papers.

41. CASES CITED—TITLE, VOLUME AND PAGE GIVEN.

In citing cases from published reports, the title of the case shall be given as well as the volume and initial page and also the page whereon the matter for which the citation is made may be found. If a case is published in more than one series of reports, the citation to the official report should be given, if possible.

42. ORAL ARGUMENT—WHEN ALLOWED.

Oral argument upon final hearing may be had by order of court, *sua sponte*, or upon written request therefor filed with the clerk within fifteen days from the expiration of time for reply brief. Due notice of the time set for the argument will be given by the clerk. Oral arguments shall be limited to thirty minutes on each side, unless the time be extended by order of the court, and will not be permitted on applications for *supersedeas* or on motions for rehearing.

43. PUBLIC UTILITIES COMMISSION—WRITS OF REVIEW.

On Writs of Review to the Public Utilities Commission, the party applying for such review shall file with the clerk of this court within five days after the issuance of said writ, fifteen copies of an abstract of the record, covering so much thereof as is necessary for the determination of the questions raised. Within five days thereafter, he shall file his brief, and the opposing party shall have ten days in which to file an answering brief. Reply briefs shall be filed within five days thereafter. Fifteen copies of briefs shall be filed in each case, printed as required in other cases, and service thereof on the opposing party or counsel shall be made as provided by Rule 37.

44. INDUSTRIAL COMMISSION—BRIEFS.

On writs of error involving causes determined by the Industrial Commission, briefs are not required to be printed, but if not printed, they shall be typewritten, legibly and upon good paper of ordinary legal-cap size (8" x 13").

Within fifteen days after the issuance of a writ of error, the plaintiff in error shall file with the clerk ten copies of his brief; within ten days thereafter the defendant in error shall file ten copies of his brief; and within five days thereafter the plaintiff in error may file his reply brief. No abstract of record is required.

Such cases shall not be argued orally except at the request of the court.

45. MOTIONS—HOW MADE—BRIEFS THEREON.

All motions shall be in writing. After appearance the opposite party shall be entitled to notice of motions not of course.

The party filing any such motion shall have three days in which

to file briefs in support thereof; the party opposing shall have five days after service of copy upon him to answer, and three days shall then be allowed after like service for reply. The motion shall then stand submitted.

All such briefs may be typewritten. Copies of the same shall be served upon the opposite party or his attorney.

46. RECORD OR PAPERS FROM FILES—WITHDRAWAL OF.

No paper shall be taken from the files, without leave of court, except the record, which may be withdrawn by counsel for fifteen days and no more, for the purpose of making abstracts.

Every paper taken from the files, by leave of court or otherwise, must be retained in the custody of the party withdrawing it and must not be in any manner mutilated, taken apart, cut or marked.

47. REHEARING.

Application for rehearing shall be by petition, signed by counsel, briefly stating the points supposed to have been overlooked, or misapprehended by the court, with proper reference to the particular portion of the abstract and brief relied upon. Such petition shall be filed within fifteen days after the filing of the opinion, and shall be printed in conformity to the rules as to printed briefs. No answer thereto will be permitted and no action will be taken on such petition save to grant or deny the rehearing. In no case will argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files.

48. REHEARING—FILING PETITION FOR—EFFECT OF.

The filing of a petition for a rehearing shall suspend proceedings under the decision until the petition is disposed of, unless the court in term time, or one of the Justices in vacation, shall otherwise order.

49. REMITTITUR—WHEN ISSUED.

Upon the denial of a petition for rehearing, or if within fifteen days after final judgment, no such petition shall have been filed, the clerk shall, except in an original proceeding, issue remittitur to the court below, and within thirty days thereafter shall return to the trial court, or otherwise dispose of as this court shall direct, all exhibits remaining in his office and not bound with the bill of exceptions.

50. COSTS—TAXATION.

Unless otherwise ordered the successful party in proceedings not original shall recover as costs in this court:

- 1st. His actual costs paid to the clerk of this court;

2nd. His expenses actually and necessarily incurred for transcript of the record, not exceeding 20 cents per folio;

3rd. His expenses actually and necessarily incurred for printing the abstract of record, not exceeding \$1.00 per page;

4th. His expenses actually and necessarily incurred in procuring a bill of exceptions, not exceeding 20 cents per folio.

The clerk, subject to the court, may require proof of incurrence of any such expense and of the necessity therefor, and may allow or disallow taxation thereof.

The court may order additional costs for frivolous prosecution of writs of error or other procedure, or remit costs, or in any case make such order concerning costs as it sees fit.

This rule to apply only to cases in which judgment is entered in the trial court after November 23, 1921.

51. COSTS—COPIES OF RECORDS.

The clerk shall be entitled to receive the fees allowed by law for copies of records before delivering the same, except in criminal cases where the defendant is unable to pay for a transcript of the record and the trial court shall have ordered the same to be furnished without charge.

52. COSTS—CLERICAL.

Except as otherwise herein provided, there shall be paid to the clerk by the party filing any suit or proceeding, the sum of twenty dollars (\$20.00), which shall be in full payment of all clerical costs of such party, except for copies of papers. The opposite party upon entering his appearance, shall pay the sum of five dollars (\$5.00), which shall be in full of his clerical costs. Said payments shall be taxed and recovered as costs.

53. RETRIAL OF SPECIFIED QUESTIONS OF FACT.

On reversing a judgment, the court may order a retrial of specified questions of fact, and direct that specific questions of fact stand as established when it appears that neither party to the action will be prejudiced by such order.

54. AFFIRMANCE OF JUDGMENT OF DISMISSAL—AFFIRMANCE OR REVERSAL OF JUDGMENTS ON DENIAL OF SUPERSEDEAS—ON AFFIRMATION OR REVERSAL OF JUDGMENTS GENERALLY.

Whenever a writ of error shall be dismissed, this court may, in its discretion, affirm the judgment of the court below. Whenever a *supersedeas* is denied, the court, in its discretion, may affirm or reverse the judgment. Any judgment may be affirmed without written opinion, but on reversal the court shall give its reasons for such action, except

in cases where it renders judgment here, or directs what judgment shall be entered in the court below.

55. COPIES OF OPINION FURNISHED COUNSEL.

In all cases where a written opinion is handed down, the clerk shall mail a copy to one attorney upon each side of the case.

56. ORIGINAL JURISDICTION—WRITS—APPLICATION FOR—CONTENTS.

In any application made to the court for a writ of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, or for any prerogative writ to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the matter necessary to support such application, also set forth the circumstances which render it necessary or proper that the writ should issue from this court, and not from such other court.

In case any court, justice, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings; and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve, or cause to be served, upon such party or parties in interest a true copy of the petition and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

III.

LIBRARY.

57. The clerk shall file with the librarian of the Supreme Court library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this court, which shall become a part of the court library. The clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this court.

58. No book shall be withdrawn from the library of this court, for any purpose, except by order of court in open session.

59. Silence is required in the library. Employees shall observe and enforce this rule.

IV.

RULES GOVERNING ADMISSION OF ATTORNEYS TO THE BAR.

60. No person shall be admitted to practice as an attorney or counselor-at-law upon evidence that he hath been admitted to the bar of another state or territory, if at the time of his admission to the bar of such state or territory he was a citizen of this state; nor shall any person be permitted to practice law in this state who shall not first have taken and subscribed an oath that he is a citizen of the United States; that he will commence the practice of law in this state within three months from the date thereof, and make the same his permanent and usual occupation; that he has never been disbarred by any court of record in which he has heretofore practiced, and that he has never been convicted of felony, and whether disbarment proceedings have ever been instituted against him, and, if so, the court wherein they were instituted.

61. A committee of Law Examiners is hereby constituted, consisting of five members of the bar of at least five years' standing, who shall be appointed from time to time by the Supreme Court, each of whom shall hold office as a member of such committee for a term of five years, and until the appointment of his successor.

62. Any person who has been admitted to practice as an attorney and counselor in the highest court of law of another state or country having power to admit to practice, and has practiced five years in its courts of record, may, in the discretion of the Supreme Court, be admitted and licensed without an examination; *Provided*, That the requirements for admission in said state or country are equal to those in this state.

Said proviso shall not, however, apply to a person who has been admitted to practice as an attorney and counselor in the highest court of law of said state or country having power to admit to practice, and has practiced ten years in its courts of record.

Such person shall prove, by his own affidavit or otherwise, if required, to the satisfaction of the Committee of Law Examiners: That he is a citizen of the United States; that he is twenty-one years of age, stating his age; that he is a citizen of the state, stating his address, and stating with particularity the community or communities in which he resided and practiced covering a period of five years next preceding the date of his application.

Such person shall also produce a certificate of recommendation from one of the judges of the highest court of law of such other state or country, or furnish other satisfactory evidence of character and qualifications.

Such affidavit and recommendation or evidence shall be presented to the Committee of Law Examiners, who shall pass thereon, and, if satisfactory, shall give to the applicant for admission a certificate of

recommendation for admission to the bar of this court, and said committee shall be entitled to hold said application for the period of sixty days for the purpose of making an investigation as to the character and qualifications of the applicant.

All other persons may be admitted and licensed only as hereinafter provided.

63. To entitle an applicant to an examination as an attorney and counselor, he must prove, by his own affidavit, and otherwise, if required, to the satisfaction of the Committee of Law Examiners:

(a) That he is a citizen of the United States; twenty-one years of age, stating his age; and a resident of the state, stating his address; and that he has not been examined for admission to practice, and been refused admission and license, within six months immediately preceding (or within two years, if certificate has been refused on ground of moral character), and has, during said time, diligently prosecuted the study of law and that at the beginning of his study of the law he had the scholastic qualifications herein required.

(b) That he has studied law in the manner and according to the conditions hereinafter prescribed for a period of three years, and that he is the same person mentioned in his preliminary papers, except that persons who have been admitted as attorneys in the highest court of another state or country having jurisdiction to license attorneys, and have remained therein as practicing attorneys for at least two years, may be admitted to such examination after a period of law study of one year within this state.

64. Applicants for examination shall be deemed to have studied law, within the meaning of these rules, only when they have complied with the following terms and conditions, viz.:

(a) The provisions for requisite periods of study must be fulfilled, after the age of eighteen years, by serving in this state a regular clerkship in the office of an attorney of the Supreme Court who is a judge of a court of record or in the active practice of the law in this state, or by pursuing the prescribed course of an incorporated law school, or a law school connected with an incorporated college or university, whose standing shall be approved by this court, organized with competent instructors and professors, in which instruction is regularly given, or by pursuing such course of study, in part as a student of such law school, and in part by serving such clerkship.

(b) The one year of law study prescribed by subdivision b. Rule 63, for applicants who have been admitted to the bar of another state or country, shall be pursued after said practice for the period of two years in said state or country has been completed.

(c) Applicants who are not members of the bar, as above prescribed, shall satisfy said committee that they graduated from a high school or preparatory school whose standing shall be approved by the committee, or were admitted as regular students to some college or

university, approved as aforesaid, or, before entering upon said clerkship or attendance at a law school, they passed an examination before the State Superintendent of Public Instruction in the following subjects: English literature, civil government, algebra to quadratic equations, plane geometry, general history, history of England, history of the United States; and the written answers to the questions in the above named subjects shall be examined as to spelling, grammar, composition, and rhetoric. The said examination shall be conducted in connection with the regular county examinations of teachers.

Attendance at a law school during a school year of not less than eight months in the year shall be deemed a year's attendance under this rule; and, in computing the period of clerkship, a vacation actually taken, not exceeding three months in each year, shall be allowed as part of such year.

It shall be the duty of attorneys with whom a clerkship shall be commenced to file a certificate of the same in the office of the clerk of the Supreme Court, which certificate shall in each case state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing, and shall be computed by the calendar year.

65. The Committee of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be as follows, viz.:

(a) That he has been admitted to the bar of another state or country, by the production of his license or certificate executed by the proper authorities, and that he remained therein as a practicing attorney for at least two years, by the applicant's affidavit stating where he resided during said time.

(b) That he has served, after attaining the age of eighteen years, a regular clerkship in the office of an attorney of the Supreme Court who is a judge of a court of record or in the active practice of the law in this state, by filing with the committee a certified copy of the certificate of clerkship as filed in the office of the clerk of the Supreme Court, and filing an affidavit of the attorney with whom such clerkship was served showing the actual service of such clerkship, the continuance and end thereof, and that not more than three months' vacation was taken in any one year.

(c) The time of study allowed in a law school must be proved by the certificate of the dean or secretary of the faculty under whose instruction the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must also state the age at which the applicant began his study at such law school; which proof must be satisfactory to the committee of examiners.

(d) The fact of graduation from a university, college, high school,

or preparatory school, or of admission to a college or university, may be proved by a diploma or certificate signed by some officer or instructor of the school, college, or university.

(e) The fact of having passed the examination before the Superintendent of Public Instruction may be proved by the certificate of that officer.

(f) That the applicant is of good moral character, by the certificate of the attorney with whom he has passed his clerkship, or of some attorney in the town or city where he resides; but such certificate shall not be conclusive, and the committee may make further examination and inquiry.

(g) When it satisfactorily appears that any diploma, affidavit, or certificate required to be produced has been lost or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or, by the death or absence of the person or officer who should have made it, cannot be obtained, the Committee of Law Examiners may accept such other proof of the requisite facts as they may deem sufficient.

66. The Committee of Law Examiners shall hold two examinations in each year. Such examinations shall be held in the months of June and December in the Capitol Building at Denver, Colorado, and *one portion thereof shall consist of an oral examination by, or in the presence of, the court en banc.* It shall also be the duty of the committee to pass upon and report to the court the qualifications of applicants presenting themselves under the provisions of Rule 62, either at special meetings called by the chairman of the committee, when such applications may be presented, or by individual recommendation evidenced by a certificate signed by the members of the committee, or by the majority thereof.

67. It shall be the duty of the Secretary of the Committee of Law Examiners to promptly transmit to the Grievance Committee of the State Bar Association the names of all who make application to take the examinations for admission to the bar.

As soon as possible after each examination the committee shall furnish to the clerk of the Supreme Court the names and addresses of all persons who have taken the examination. The clerk shall immediately post said names and addresses in a conspicuous place in his office and keep them so posted for a period of thirty days. The clerk shall also furnish said names and addresses to such newspapers as desire to publish them. Any person may, during said period, present to the committee any information, indicating that an applicant is not of good moral character, or otherwise bearing upon the question of his qualifications, or the propriety of his admission. Such information shall be held confidential unless in the opinion of the court, its disclosure becomes necessary in a hearing on the application. As soon as possible after the expiration of said thirty-day period the committee shall certify to the court the names of all persons who have taken the exam-

ination, together with the committee's recommendation as to each. As to each applicant to whose admission objection has been made, or concerning whom special information has been presented, the committee shall report these facts to the court in detail, together with its recommendations and reasons therefor.

As soon as convenient after the receipt of the certificate of recommendation the Court will consider the same and order that the several applicants be, or be not, admitted, or that their applications be continued for further hearing or consideration. The court may, in its discretion, consider objections to the admission of any applicant irrespective of the presentation of the same within said thirty-day period. Provided always, that no applicant will be refused admission by reason of any charges concerning his moral character, or otherwise, without an opportunity to be heard. Such hearing may be before the Court *En Banc*, or in Department, or before the committee, or before a Commission appointed by the Court, as the court in its discretion may determine.

68. The admission of all applicants shall be by order of the Court *En Banc*, duly entered of record, from which any Justice may dissent, and certificate of admission issued to applicants shall be signed by the Justices, or a majority thereof.

V.

CONTESTED ELECTIONS.

69. Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme, district, or county judge, shall within thirty days after the canvass of the State Board of Canvassers, in case of a presidential elector, supreme, or district judge, file in the office of the Secretary of State a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the county in which the person whose election to the office of county judge is contested, resides, within thirty days after the canvass by the county board of canvassers, which statement shall set forth:

First—The name of the contestor.

Second—The name of the contestee.

Third—The office.

Fourth—The time of the election.

Fifth—The particular cause of contest.

The statement shall be verified by the affidavit of the contesting party that the causes set forth are true, as he verily believes.

70. It shall be the duty of the Secretary of State and the county clerk to safely keep and preserve all such statements in their respective offices.

71. If the contest is to be further prosecuted, the contestor, or some

one in his behalf, or in behalf of the person for whose benefit the contest is made, shall, within thirty days after the filing of such statement of contest, file in the office of the clerk of the Supreme Court, if the contest relates to a presidential elector or supreme judge, or in the office of the clerk of the District Court in the proper county of the judicial district, if the contest relates to a district or county judge, a petition setting forth the filing of the statement of contest and the particular grounds therefor; which petition shall be verified by the oath of some credible person. Upon the filing of such petition, if the contest relates to a presidential elector or supreme judge, the clerk of the Supreme Court shall issue a summons, or if the contest relates to the office of district or county judge, then the clerk of the proper District Court shall issue a summons, directed to the sheriff of the county where the respondent resides, under the seal of the court; which summons, if issued out of the Supreme Court, shall bear *teste* in the name of the Chief Justice, and if issued out of the District Court, then in the name of the district judge, or of the presiding judge of said court, and be returnable in not less than ten nor more than thirty days; the same may be served by the sheriff of the county in the same manner that like writs are served from the District Court, and shall command the respondent to be and appear before the court from which the writ issues by a day to be named therein, and answer the petition of the petitioner in that behalf; such summons may be issued to any county in this state where the respondent may be found. *Alias* and *pluries* writs may issue in case service is not had under the original.

72. Upon the return day of the writ, if it shall appear that due service has been had, and the respondent fails to plead, default may be entered, and in that case, if the proceeding is pending in the Supreme Court, the court, or any four or more judges thereof in vacation, or if the proceeding is pending in the District Court, then the District Court, or any judge thereof in vacation, may grant the relief demanded, either with or without proof, as in the judgment of said court or the judges, or judge, thereof it may seem proper. The respondent's answer shall be under oath and shall contain a general or specific denial of each material allegation in the petition intended to be controverted, and may contain a statement of new matter, showing in ordinary and concise language the right or title of the respondent to the office in question. The sufficiency of the petition or answer may be questioned by demurrer or motion. If a pleading be found defective, it may be amended on such terms as the court, or the judges or judge thereof, may deem proper.

Every material allegation of the petition not controverted by the answer will be taken as true; the statement of any new matter in the answer will, at the hearing, be deemed controverted by the petitioner.

The petition, answer, and demurrer or motion shall constitute the pleadings in the case.

73. When the case is at issue, the court, or, as the case may be, the judges, or judge, thereof in vacation, shall hear and determine the same in a summary manner, without the intervention of a jury. Unless otherwise ordered, no witness will be examined in open court, or before, or in the presence of, the judges, or judge, thereof in vacation.

Either party, after the issues are formed, may have the deposition of any witness taken before any officer authorized by law to administer oaths, which deposition shall be taken and returned in the manner prescribed by the civil code for the taking and returning of depositions in ordinary civil actions.

74. The finding and judgment of the court, or the judges, or judge, thereof, in vacation, as the case may be, shall be entered at length upon the record of the court. The court, or, as the case may be, the judges, or judge, thereof in vacation, shall award costs to the successful party, and execution shall issue therefor, the same as in other cases. Witnesses and officers shall receive like compensation as prescribed by law for like duties and services in cases in the District Court.

VI.

75. RULES IN FORCE—WHEN.

These rules shall take effect July 1, A. D. 1920.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

AT JANUARY TERM, A. D. 1922.

No. 9977.

CRAMPTON *v.* IRWIN.

Decided January 9, 1922.

Action by real estate broker for commission. Judgment for plaintiff.

Reversed.

1. **BROKERS—Real Estate—Commission.** When a sale does not actually take place, the broker cannot recover commissions unless he shows that he procured and produced to his principal a person ready, willing and able to purchase the property upon the

(1)

terms and conditions under which he was authorized to negotiate the sale.

The ability of the prospective purchaser to purchase is an essential element to be pleaded and established.

Error to the District Court of Phillips County, Hon. L. C. Stephenson, Judge.

Mr. CLAUDE D. WALROD, Messrs. ALLEN & WEBSTER, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action to recover a real estate broker's commission. The cause was tried to the court without a jury. Judgment was for plaintiff, and defendant brings error.

The plaintiff in error, defendant below, asserts in his brief as follows:

"The complaint nowhere alleges that the prospective purchaser was ready, able and willing to purchase, and the testimony introduced entirely omits all proof on the question of the ability of the prospective purchaser to purchase."

We have read the abstract, and it sustains the foregoing proposition. The instant case is controlled by the rule stated in *Colburn v. Seymour*, 32 Colo. 430, 76 Pac. 1058, 2 Ann. Cas. 182, as follows:

"* * * When a sale does not actually take place, * * * he (the broker) cannot recover commissions unless he shows that he procured and produced to his principal a person ready, willing and able to purchase the property upon the terms and conditions under which he was authorized to negotiate a sale."

The foregoing rule was applied in *Fox v. Denargo Land Co.*, 37 Colo. 203, 86 Pac. 344, where recovery was denied because the proof failed "to establish the financial ability" of the prospective purchaser to comply with the terms of the proposed contract.

There are no allegations in the complaint, nor is there any showing in the evidence, rendering unnecessary the proof of the financial ability of the prospective purchaser. The rule above stated therefore controls. See also *Wagner v. Norris*, 39 Colo. 106, 88 Pac. 973; 9 C. J. 595.

The judgment is reversed, and the cause remanded with directions to dismiss the action.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 9983.

LEAVITT v. CONTINENTAL TRUST Co., ET AL.

Decided January 9, 1922.

Action to set aside foreclosure sale. Judgment of dismissal.

Affirmed.

1. **MORTGAGES—Sale—Redemption.** A mortgagee holding a deficiency judgment after foreclosure sale to a third person, may redeem from that sale as a judgment creditor by virtue of his deficiency judgment.
2. **Redemption by Judgment Creditor, not a Lien Holder.** Under the provisions of section 3653, R. S. 1908, any judgment creditor may redeem from a mortgage sale, and it is not necessary that he should have a lien on the property.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

MR. WILLIAM H. DICKSON, for plaintiff in error.

Messrs. SYMES & WINGREN, Messrs. WATTERS & MORRIS,
for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

LEAVITT brought suit to set aside a sale to the Continental Trust Company under a decree of foreclosure; a demurrer to the amended complaint was sustained, the plaintiff stood by his complaint, the case was dismissed and he brings error.

The amended complaint alleged that plaintiff was a judgment creditor of The Capitol Ice and Storage Company; that The Continental Trust Company, as trustee for the mortgage bondholders of the said Storage Company, brought suit to foreclose March 25, 1918, and obtained a decree September 11, 1918; that the amount found due was \$176,000.00; that all the property of the Storage Company was covered by the mortgage and was sold under the decree to The Federal Ice and Storage Company for \$31,050.00; that said Federal Company was organized and purchased the property merely in the interest of a part of the bondholders for the purpose of transferring it to The Denver Ice and Storage Company, which was done, the sale was reported and approved and a deficiency judgment rendered for \$161,000; that the property was worth \$100,000; that the small bid was made to avoid a larger payment to the minority bondholders, upon a conspiracy with the trustee and the majority bondholders to defraud the minority, yet being large enough to prevent redemption by small judgment creditors, and so to obtain the property for an inadequate price; that plaintiff purchased a judgment against the Capitol Ice & Storage Company, and obtained an execution thereon April 14, 1919, and April 28th placed it in the hands of the sheriff. But The Continental Trust Company had already redeemed from its own sale, and the property had been readvertised under the statute; that at the sale under said re-advertisement plaintiff bid the

amount required to redeem and The Continental Trust Company bid \$150,000 and became the purchaser; that the deed will be delivered unless enjoined, and that plaintiff is without remedy at law.

The alleged attempt to defraud the minority bondholders, who are not parties to this suit, furnishes no equity in favor of plaintiff; the low bid at the first sale was to his advantage, and the redemption and sale for an adequate sum remedied the fraud, if there was any. The question whether the personal property included in the mortgage was redeemable is not raised in argument, so we do not notice it.

We find it necessary to consider but one question, and our decision and opinion relate to that question only, and go no further: May a mortgagee holding a deficiency judgment, after foreclosure sale to a third person, redeem from that sale as a judgment creditor by virtue of such judgment?

The plaintiff in error argues that he may not: First, because such privilege would give him two chances at the same property on the same debt; second, because it would give him power to speculate on the property by bidding low at the first sale, obtaining the property that way if possible while holding the power to take again with his judgment should it be redeemed by any one else.

As to the first point, we see no reason why he should not have two chances if it will not interfere with the purposes of the redemption statutes, which are to enable judgment creditors to get the largest possible amount on their dues, and to secure an adequate price for the benefit of the debtor. This objection, therefore, in itself, is nothing.

As to the second point: Since the same creditor might redeem by virtue of any other judgment which he might secure by purchase or otherwise, there is little practical benefit in the suggestion and we do not see that it is of any force, where, as in the present case, the first purchaser was an outsider.

Plaintiff further claims that the redemption in this case

was improper because the Trust Company had no lien. We think, however, that no lien was necessary. The right of redemption is given by statute and our statute, unlike some others, does not require it.

The defendants in error say that such judgment creditor may redeem, because: First, he comes strictly within the terms of the statutes, Code § 271, R. S. 1908, §§ 3653, 3654 and 3657; second, the privilege is as likely to work for the benefit of the debtor as for his hurt, as is shown in the present case, where the property brought \$150,000 when, probably, it would have brought but \$32,000 if the Trust Company had not redeemed.

We think the argument is stronger for the defendants in error. The terms of the statutes are with them and cannot lightly be varied. As might be expected on such a question, the authorities are at variance. This court has never before considered the question.

The principal cases supporting our conclusion are *Strause v. Dutch*, 250 Ill. 326, 95 N. E. 286, 35 L. R. A. (N. S.) 413; *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13; *Greene v. Doane, et al.*, 57 Ind. 186; *Posey v. Pressley*, 60 Ala. 243.

Judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 9984.

HUFF v. GEIS.

Decided January 9, 1922.

Action on promissory note. Judgment for plaintiff.

Affirmed.

1. PUBLIC LANDS—*Homestead Entry by Minor*. Though a homestead entry made by one under the disability of infancy and not the head of a family is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim.
2. BILLS AND NOTES—*Promissory Note—Consideration*. The relinquishment of a homestead entry is a good and valid consideration for a promissory note.

*Error to the County Court of Logan County, Hon. W.
Mabry King, Judge.*

Mr. W. L. HAYS, for plaintiff in error.

Mr. T. E. MUNSON, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action upon a promissory note. There was a judgment for plaintiff, and defendant has sued out this writ of error.

The only defense interposed by defendant was an alleged want of consideration for the note. Both parties moved for judgment on the pleadings. The only question that need be considered upon this review is whether the answer alleges facts sufficient to show a want of consideration.

The complaint alleges that on or about March 28, 1917, one Addie Carlson entered into a written contract with the defendant; that by the terms of the contract Carlson sold to the defendant "a relinquishment" covering a quarter section of land, for the sum of \$1,000, of which \$750 was evidenced by the promissory note sued on. Plaintiff claims to be a holder of the note in due course.

The answer alleges that on January 15, 1916, Carlson "made a pretended illegal and void homestead entry" on the land, "for at (that date) he had not arrived at the age of twenty-one years and was not the head of a family," and was not otherwise qualified to make a valid homestead entry. These allegations are the basis for the defense of want of consideration. The defense is grounded on the theory that Carlson's entry was void, he had nothing to relinquish, and that therefore there was no consideration for the note.

The answer is clearly insufficient to show a want of consideration. The entry was not void, but, even if it was, it enabled Carlson to have possession of the land and to raise crops thereon. By the contract he parted with something of value to himself, and the party obtaining the relinquishment was saved the expense of a contest or of other means of securing possession of the land.

Carlson's entry, moreover, was not void, so far as shown by the allegations of the answer. It is not alleged that Carlson was still under age and not the head of a family at the time he made the relinquishment. In the *Case of James F. Bright*, reported in Vol. 6, page 602, Decisions of the Department of the Interior relating to Public Lands, it was held that "Though a filing made by a pre-emptor under the disability of infancy is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim."

The syllabus in *Dillard v. Hurd*, reported in Vol. 46, page 51, of the reports above named, reads as follows:

"A contest brought upon the ground that the entryman is a minor and not the head of a family must fail where, prior to the filing of contest affidavit, the entryman attains his majority."

If Carlson's entry was validated by his becoming of age, no contest having been instituted in the meantime, his contract of relinquishment was valid, and his relinquishment was a valuable consideration for the note. 32 Cyc. 1079, 1080.

The answer admits allegations of the complaint from which it appears that there was a consideration for the note. It admits that defendant sold crops grown upon the premises, and sold the land, and that he agreed to pay the note out of crops raised on the land. It was under the contract made with Carlson that defendant obtained possession of the crops and of the land. He received everything he expected to receive, and all that he contracted for.

There is no error in the record. The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BURKE concur.

No. 9986.

ERICKSON v. THE KNIGHTS OF THE MACCABEES OF THE
WORLD.

Decided January 9, 1922.

Action on fraternal benefit certificate. Judgment for plaintiff for \$210, the amount of premiums paid.

Affirmed.

1. **INSURANCE—Life Benefit Certificate—Application.** Where the applicant for a life benefit certificate in a fraternal society makes false answers to material questions contained in the application, which he warrants to be true, his beneficiary cannot recover on the certificate.
2. **CONTRACT—Foreign Language.** In the absence of fraud, a party may not avoid a contract which he voluntarily executes, on the ground that he could not read the language in which it was written, and that it was different from what he supposed. In such circumstances it is his duty to obtain a reading and explanation of it before signing.

*Error to the District Court of San Miguel County, Hon.
Thomas J. Black, Judge.*

Mr. L. E. MARTIN, for plaintiff in error.

Mr. GEORGE P. STEELE, for defendant in error.

En banc.

MR. JUSTICE WHITFORD delivered the opinion of the court.

THIS is an action to recover on a policy of a fraternal benefit society, issued by the defendant in error on the life of Gust A. Erickson. The complaint alleges that the benefit certificate was issued in March, 1914, to Gust A. Erickson for \$2,000.00, payable at his death to his wife, the plaintiff in error; that the insured died April 7, 1919, while in good standing, having paid in dues and assessments up to the time of his death the sum of \$210.00.

The answer denies all liability except \$210.00 received by the Society as premiums, which it offered to return and tendered repayment of that sum, and by special plea alleged that the answers given to questions contained in the application signed by the insured were false and untrue; that the false answers given to questions contained in the application and warranted by the insured to be true, were as follows:

"20. Have you ever been under the care of or consulted a physician concerning yourself for any cause within five years? No.

"21. If so, for what ailment, name and address of physician? No.

"22. Have you now or ever had any disease of the following named organs, or any of the following named diseases or symptoms? If so, give particulars. * * * Pneumonia * * * or any diseases of the throat or respiratory organs? No."

That within five years prior to the date of said application the insured had, in October and November, 1913, pneumonia, a disease of the lungs, and had been treated there-

for by Dr. Nordlund, a physician, from October 28 to November 18, 1913; that immediately thereafter the insured applied to The Continental Casualty Company for sick benefits under a policy issued by that company to him for sick benefits, and after making regular proof of sickness to that company received from it full payment for such sickness; that Gust A. Erickson made an application for membership, in writing, to the defendant in error; that in his written application he agreed and warranted that all answers to the questions therein were true, and that any untrue answer made by him should render the benefit certificate null and void. The replication alleged that the insured was a Swede and did not understand the English language; that the agent of the defendant in error did not furnish the insured with an interpreter.

The answers to the questions in one of the exhibits in evidence, signed by the insured on the 22nd day of November, 1913, and presented to The Continental Casualty Company for sick benefits, were as follows:

"6. When did you become ill? October 28, 1913. Hour, 7:00 P. M.

"7. State day and hour after you became ill on which you quit work? Oct. 28.

"8. When were you first confined to house strictly? Oct. 28.

"9. Are you at this date confined to your bed on account of this illness? Yes.

"13. Describe your symptoms? High fever and cough and pain.

"14. Name the disease? Pneumonia.

"15. How long since you were ill with it before? About a year ago.

"17. On what date did you first have a physician? Oct. 28. Where? At my house.

"19. Give name of physician. Marie Nordlund. Address Box 544."

From the physician's report, signed by Dr. Marie Nord-

lund, which is a part of the same exhibit, it appears that the doctor made the following answers to the questions therein propounded to her as the attending physician, with respect to the illness of the insured in October and November, 1913:

"6. What is the precise nature and extent of the illness? Lobar pneumonia.

"10. What symptoms were shown at first examination? Cough, fever and pain.

"12. How many times have you visited claimant at his house? 11 times.

Dates of visits? Oct. 28 to Nov. 11 every day.

"25. At first examination what was his temperature? 104. Pulse? 130. Respiration? 36."

The case was tried to the court without a jury and judgment rendered for the plaintiff for \$210.00. Plaintiff brings error. There is no conflict in the testimony. Under this positive and uncontradicted documentary evidence, which was corroborated by the testimony of the two daughters, the finding in favor of the defendant in error was correct. The statements and answers to questions in the application were warranties, and the answers being unmistakably untrue, the plaintiff is not entitled to recover. *Knights and Ladies of Security v. Considine*, 61 Colo. 474, 158 Pac. 282.

It is further urged that the insured was a Swede and did not understand the English language, and therefore it is urged that the insured could not be bound by his statements and answers to the questions in the application. The testimony touching the averments of the replication is very meager. It simply shows that the insured was a Swede of average intelligence, who could sign his name, but could not understand or write the English language. The record is silent as to what took place at the time of the making and signing of the application. This showing is wholly insufficient to save the policy. The rule of law on this subject is thus stated:

"A party's mere ignorance, occasioned by his limited intelligence and understanding of the language and of the contents of the contract which he voluntarily executes, is not, in the absence of fraud, a ground for avoiding it, although it is different from what he supposed. So where a person can not read the language in which a contract is written, it is ordinarily as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able so to do, and his failure to obtain a reading and an explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." 13 Corp. Jur. 372; *Chicago R. R. v. Belliwith*, 83 Fed. 437-439, 28 C. C. A. 358; *Lauze v. N. Y. Life Co.*, 74 N. H. 334, 68 Atl. 31.

We find no prejudicial error in the record.

Affirmed.

MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BAILEY not participating.

No. 9989.

BLACKMAN v. PRING.

Decided January 9, 1922.

Action for specific performance. Demurrer to complaint sustained.

Affirmed.

1. SPECIFIC PERFORMANCE—*Indefinite Contract*. Where a contract of option provided a consideration for 600 acres of a 950 acre tract, with no consideration expressed for the balance, it was

void as to the 350 acres, under the statute of frauds, section 2662, R. S. 1908.

2. *Entire Contract to be Enforced.* The general rule, applicable to this case is, that a contract to be specifically enforceable must be such as can be enforced in its entirety. A partial enforcement will not suffice.

*Error to the District Court of El Paso County, Hon.
Arthur Cornforth, Judge.*

Messrs. CUNNINGHAM & FOARD, for plaintiff in error.

Messrs. ORR & LITTLE, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

PLAINTIFF below brought this suit to compel defendant to execute a deed for certain lands, or, if that should be shown, on the trial, to be impossible, then for damages. The trial court sustained a demurrer to the amended complaint. Plaintiff elected to stand on the complaint, and judgment was entered for defendant. The former has sued out this writ of error.

It appears from the complaint that plaintiff's rights are predicated upon a certain option agreement, contained in a farm lease, and his election to exercise his right of option and his tender of the purchase price named in the option agreement.

The demurrer was sustained, as appears from the briefs on either side, on the theory that the description of the land, as contained in the agreement, is so uncertain that the writing does not satisfy the statute of frauds, and specific performance does not lie with reference to the agreement. The correctness of that theory is the only question to be now determined.

The land which by the agreement is leased is described as follows:

"* * * Situated in the County of El Paso and State of Colorado, to-wit:

About 950 acres located near Pring Station on the Santa Fe R. R. Right of Way, the most of which is known as the

old Pring ranch or home ranch, and 120 acres of which is land recently acquired of O. P. Jackson."

The option agreement, contained in the lease which describes the leased lands as above set forth, reads as follows:

"The first party hereby agrees to give to second party the exclusive right to purchase the said premises at any time within one year from date hereof, upon the following terms and conditions; twenty-five dollars (\$25.00) per acre for the six hundred acres upon which the permanent improvements of the ranch are now situated; said right to purchase to be extended and renewed as the said lease is extended and renewed."

It appears from the contract that the option, now sought to be enforced, is not given upon a tract of 600 acres, but upon the entire tract of 950 acres. The option paragraph of the contract expressly refers to "said premises," and these are described in the preceding paragraph and comprise an area of 950 acres.

The contract of option provides a consideration for 600 acres, but no consideration is expressed as to the remaining 350 acres. It follows that the option as to the 350 acres is void under our statute of frauds, section 2662 R. S. 1908, providing that "every contract * * * for the sale of any lands, * * * shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing."

Plaintiff is not entitled to specific performance of the remaining part of the contract. In *Riverside Co. v. Sawyer*, 24 Colo. App. 442, 447, 134 Pac. 1011, the court quoted the following from 36 Cyc. 572:

"A contract to be specifically enforceable, must be such as can be enforced in its entirety; a partial enforcement by piece-meal not sufficing."

While this is a general rule, having exceptions, it applies in the instant case. There is but one option, namely, on the entire tract of 950 acres, and it cannot be divided up, and enforcement sought as to 600 acres.

There was no error in sustaining the demurrer. The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BURKE concur.

No. 9997.

HUFFAKER v. IRELAND.

Decided January 9, 1922.

Action on open account. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—*Sufficiency of Evidence.*** A verdict supported by sufficient evidence will not be disturbed on review.

Error to the County Court of the City and County of Denver, Hon. George W. Dunn, Judge.

Mr. S. S. ABBOTT, for plaintiff in error.

Messrs. NORTHCUTT, FREEMAN & NORTHCUTT, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS action was originally brought in a Justice Court for the balance alleged to be due on an open account for coal sold and delivered. The cause was tried to a jury. There was a verdict and judgment for plaintiff for \$113.65, the full amount claimed. Defendant appealed to the County Court where after a trial to a jury, verdict and judgment were again for plaintiff for the same amount. Defendant brings the cause here for review.

After a careful review of all the testimony, we find the evidence sufficient to support the verdict. Much of the evidence was conflicting, and we should not disturb the verdict. There was no error in receiving or rejecting testimony.

We find no error in refusing instructions. Those given appear to have covered the points in controversy, and were fair to both parties.

The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BURKE concur.

No. 9999.

COLLEY v. ROWAN.

Decided January 9, 1922.

Action on promissory note. Demurrer to complaint sustained and cause dismissed.

Reversed.

1. LIMITATIONS—*Statute of.* The running of the statute of limitations does not cancel the debt, the statute goes only to the remedy.
2. BILLS AND NOTES—*Promissory Note—Indorsement—Limitation.* The indorsement of a promissory note after delivery and which is not a part of the original transaction, creates a new contract and as to the indorser the statute of limitations begins to run from the indorsement.

Error to the County Court of Routt County, Hon. Charles A. Morning, Judge.

Mr. A. M. GOODING, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

Plaintiff in error brought suit against the defendant in error upon a promissory note upon which the latter was an endorser. The note was due June 14, 1913. The complaint alleged that Rowan endorsed the note on September 1, 1914. Suit was begun March 13, 1920. The defendant Rowan demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against the defendant, and that it showed upon its face that the cause of action had accrued more than six years before the commencement of this suit. The court sustained the demurrer and the cause is now before us on error to the judgment dismissing the action.

It is assigned as error that the court sustained the demurrer upon the ground that the statute of limitations had run in favor of the defendant. It appears that the court was of the opinion that the running of the statute cancelled the debt, and extinguished the note. That such is not the fact is so well settled as not to require the citation of authorities. The statute of limitations goes only to the remedy.

The court erred also in holding that six years had run in favor of the defendant endorser. That the endorsement creates a new contract is also well settled.

In Daniel on Negotiable Instruments, section 669, (5th ed.) it is said:

"The indorsement of a bill or note is not merely a transfer thereof, but it is a fresh and substantive contract, embodying all the terms of the instrument endorsed in itself. * * *. So entirely distinct and independent is the contract of the indorser of a note from that of the maker that at common law a separate action against each was indispensable."

That the statute of limitations begins to run from the indorsement, where, as in this case, the indorsement is

made after delivery, and not as a part of the original transaction, follows as a consequence of the above statement. *Whisler v. Bragg*, 31 Mo. 124; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516.

In Wood on Limitations, Vol. 1, Sec. 134, it is said:

"The indorsement of a bill after it is dishonored creates a new contract as to the indorser and indorsee. Thus, if A. is the holder of a dishonored bill, and three years afterwards he indorses it to B., while the indorser must sue the acceptor within six years from the time when the bill matured, yet he has six years from the date of the indorsement in which to sue A. * * *. The statute only begins to run from the date of indorsement, because that is the time when the right of action accrues against the indorser."

The complaint is in the usual form in an action on a promissory note, and is good as against a general demurrer.

For the reasons above stated the judgment is reversed.

MR. JUSTICE ALLEN and MR. JUSTICE BURKE concur

No. 10,198.

PHILBRICK v. THE CONEJOS COUNTY STATE BANK.

Decided January 9, 1922.

Action to set aside judgment. Judgment for defendant.

Affirmed.

On Application for Supersedeas.

1. JUDGMENT—*Motion to Set Aside.* A judgment confessed under warrant of attorney will be set aside if a meritorious defense is shown and the application is made in apt time.

2. *Motion to Vacate—Apt Time.* Defendant delayed for eighty-six days after having full knowledge of a judgment against him, to file a motion to set it aside. Held, under the circumstances of this case, that the motion was not made in apt time.

Error to the District Court of Rio Grande County, Hon. Jesse C. Wiley, Judge.

Mr. J. A. DONOHOE, Mr. M. G. SAUNDERS, Mr. E. F. CHAMBERS, for plaintiff in error.

Mr. JOHN T. ADAMS, for defendant in error.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error sues out this writ to review the action of the trial court in denying his motion to set aside a judgment obtained against him by defendant in error, the basis of which was a judgment note, and asks the issuance of a supersedeas. The parties are hereinafter designated as in the original complaint.

The judgment from which defendant seeks relief was entered March 3, 1921; his appearance in the cause was by counsel under general power contained in the note; his motion to vacate was filed June 3, 1921, supported by an affidavit of merits alleging fraud; he makes no attempt to show diligence and does not disclose when he first learned of the judgment. One Whitman, vice president of plaintiff bank, and acting for it, files his affidavit that the defense is bad. He further alleges that suit was begun on this judgment March 5, 1921, in the U. S. District Court in Nebraska; that defendant was served therein March 7, 1921; and that such further proceedings were had therein that on June 3, 1921, defendant's property, seized under attachment in that action, was ordered sold by the court. None of these things, save the invalidity of the defense of fraud, are disputed. It is therefore immaterial that some of these allegations are supported by certified copies of files and orders in the Nebraska suit, which were not filed herein until after the submission of the motion to vacate.

That defendant was entitled to have this judgment set

aside for a good defense on the merits, if his affidavit showed, *prima facie*, such a defense, and if his application was made in apt time, notwithstanding the counter affidavit that the defense was bad, is well settled in *Richards v. First Nat. Bank*, 59 Colo. 403, 405, 148 Pac. 912. That defendant's affidavit shows, *prima facie*, a good defense (a doubtful proposition) we assume for the purposes of this cause. Whether this application was in apt time was first to be determined by the court. Whitman's affidavit, which could not be considered on the question of merits, could be considered on the question of apt time. Its allegations are undisputed.

It thus develops that there was a 90 days' delay between the date of the entry of the judgment in Colorado and defendant's motion to vacate, and that, for at least 86 days of that time, he had full knowledge thereof. Not until the day of the entry of the Federal court's order for the sale of all the attached property in Nebraska did he file his motion to vacate the Colorado judgment. In other words, defendant, when apprised of this judgment, elected first to attempt to defeat plaintiff's recovery thereon in the U. S. District Court, and not until a complete failure there did he decide to attack the judgment itself.

"Laches is a term of flexible import; and whether it exists in a given case or not, depends upon facts and circumstances peculiar to that case. It means something more than mere delay. Some other element must combine with the delay to constitute laches, and hence, in some cases, a party has been concluded by a delay of months or even weeks, while in others his rights have been held unaffected by a delay of years. The question ordinarily is whether during the period of delay, such changes have taken place in the position of parties, relative to the subject-matter of the litigation, as to render it inequitable to permit the enforcement of rights, concerning which otherwise there might be no difficulty." *DuBois v. Clark*, 12 Colo. App. 220, 231, 55 Pac. 750, 753.

Where a party knew of a judgment immediately upon its

rendition,—“his conduct in waiting twenty-one days before making any attempt to have the same set aside does not bring him within the rule which applies, or may under certain circumstances apply, to those against whom a judgment has been rendered, ‘through mistake, inadvertence, surprise or excusable neglect.’” *Hollingsworth v. Ring*, 26 Colo. App. 121, 126, 141 Pac. 139, 141.

Where the petition to vacate was not filed until three months after the entry of judgment and thirty-one days after issuance of execution relief was denied. *Hille v. Evans*, 68 Colo. 98, 103, 187 Pac. 315. Whether this motion to vacate was in apt time depends, therefore, upon the facts and circumstances peculiar to this case. Time is an element, but not a controlling one. Material changes in the position of the parties relative to the matter in controversy are of much greater moment. During the delay plaintiff has been put to considerable inconvenience and expended no inconsiderable sum in enforcing its rights under the judgment, all with full knowledge on the part of defendant, and all to no purpose if the judgment be now vacated. We must, therefore, hold that the delay, under the circumstances, bars the relief sought. Defendant is not in apt time. The supersedeas is accordingly denied and the judgment affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN, sitting for MR. JUSTICE BAILEY, concur.

No. 10,204.

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPORATION
v. COHEN, ET AL.

Decided January 9, 1922.

Action on policy of insurance against loss by burglary.
Directed verdict for plaintiffs.

Reversed.

On Application for Supersedeas.

1. VERDICT—*Directed—Conflicting Testimony.* Where there is a substantial conflict of testimony upon the matter at issue, and the record shows that a verdict for defendant would not have been manifestly against the evidence, it is error to direct a verdict for plaintiff.

*Error to the District Court of the City and County of
Denver, Hon. L. C. Stephenson, Judge.*

Mr. FRANK L. GRANT, for plaintiff in error.

Mr. IRA C. ROTHGERBER, Mr. WALTER M. APPEL, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action by the insured against the insurer upon a policy of insurance against loss by burglary. There was a directed verdict in favor of the plaintiffs, and thereafter a judgment in accordance with the verdict was rendered for plaintiffs. A motion for new trial was dispensed with. The defendant brings the cause here for review, and applies for a supersedeas.

The only question presented for our determination is whether the court erred in directing the verdict.

The alleged loss, sought to be indemnified in this case, is one by alleged burglary of a store-room on the second floor

of a building adjoining an alley. The only place of entry, in the commission of the burglary, is, by the plaintiffs' evidence, designated as a window facing the alley. The policy of insurance sued on indemnifies for loss by burglary under the conditions shown or provided for in the following clause:

"(1) For All Loss by Burglary of merchandise, * * * occasioned by any person or persons who shall have made felonious entry into the premises by actual force and violence when such premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry, by tools, explosives, electricity or chemicals."

The allegations of the complaint showing these conditions to exist, were denied in the defendant's answer.

The record shows a substantial conflict of testimony upon the issue of whether there were visible marks of force and violence at the place of entry. The record further shows that a verdict for defendant would not have been manifestly against the weight of the evidence. It was error to direct a verdict for plaintiffs. *Rosenbaum v. Fueller*, 52 Colo. 638, 123 Pac. 648. Even if the plaintiffs' evidence as to marks of a felonious entry into the premises was not contradicted, it would still be error to direct a verdict. *Colorado Springs v. Coray*, 25 Colo. App. 460, 139 Pac. 1031. The jury might not believe their testimony. *Ward v. Atkinson*, 22 Colo. App. 134, 123 Pac. 120. Moreover, if the jury found that there were visible marks at the place of entry, it might find that such marks were not marks, by tools, of force and violence used in making a felonious entry. The jury may draw inferences of fact from other facts. *International Text Book Co. v. Pratt, etc. Co.*, 61 Colo. 571, 158 Pac. 712; 38 Cyc. 1517.

The judgment is reversed and the cause remanded for new trial.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BURKE concur.

No. 10,224.

THE INDUSTRIAL COMMISSION, ET AL. v. PEPPAS.

Decided January 9, 1922.

Proceeding under the Workmen's Compensation Act. The district court reversed the findings and award of the industrial commission.

Reversed.

1. **WORKMEN'S COMPENSATION—Non-Resident Dependent—Limitation.**
Under the provisions of section 62, chapter 179, S. L. 1915, regarding workmen's compensation, if no written notice of the accident shall be given to the industrial commission by a non-resident claimant within one year, and no compensation is paid within that period, the claim is barred, unless for some sufficient reason the running of the statute is delayed or postponed.
2. **Industrial Commission—Petition for Review—Law Applicable.**
Under the provisions of section 98, chapter 210, S. L. 1919, application to the industrial commission for a review of its findings and award is a prerequisite to the bringing of a court action to set aside such award.

This section is remedial, and the law in force at the time of the ruling of the commission, is the one applicable to the claim under consideration.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. FRANK C. WEST, for plaintiffs in error.

Mr. N. C. CALOGERAS, for defendant in error.

Department Three.

MR. JUSTICE BURKE delivered the opinion of the court.

DECEDENT Peppas, a citizen of Greece, was the husband of defendant in error (hereinafter referred to as plaintiff)

and she and her children still reside there. Peppas was injured November 14, 1916, and from the effects of that injury died four days later. Greece was blockaded from November, 1916, to August, 1917. Plaintiff received information of the death in November, 1917, and executed and sent to the United States a power of attorney authorizing two persons named therein to represent her in connection with any rights or claims she might have by reason of said injury and death. No action was taken under said power of attorney. January 6, 1920, the Consul of Greece, stationed at San Francisco, filed claim for compensation with the Industrial Commission. August 16, 1921, the Commission rendered its findings and award denying the claim. An appeal was taken to the district court where the findings and award were reversed. To review that judgment the cause is now before us.

BURKE, J., after stating the facts as above.

The findings and award of the Industrial Commission can be upheld, and the judgment of the district court reversed, only upon two grounds. 1. That the claim was not filed in time. 2. That no motion for a rehearing was presented to the Commission.

1. Section 62, chapter 179, L. 1915, reads in part:

"No claim to recover compensation under this act shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, the nature and cause of the injury, and making a claim for compensation with respect to injury and signed by the person injured, or by some one in his behalf, or in case of death, by a dependent or some one on his behalf, stating also the names and addresses of each dependent, shall be served upon the commission, * * *. Provided, however, That the failure to give any such notice or any defect or inaccuracy therein, shall not be a bar to a recovery under this act, if it is found as a fact in the

proceedings for the collection of the claim, * * * that said claimants were nonresidents; And, provided further, That if no such notice is given, and no payment of compensation has been made within one year from the date of the accident, the right to compensation therefor shall be wholly barred."

It is undisputed that no such notice was given and no payment made within one year from the date of the accident. It is contended that the existence of the war and the blockade of Greece prevented such action and excused the failure. This would be true only in so far as those facts were responsible for the failure. Plaintiff received actual information of the death in November, 1917. Conceding everything claimed on her behalf, the statute would begin to run on that date. The claim would be barred in November, 1918, and it was not filed for more than one year thereafter.

2. Section 77 of said Act of 1915, reads in part as follows:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a hearing thereon as provided in this act."

This chapter was amended in 1919, and appears as chapter 210 of the acts of that year. Section 98 thereof reads in part as follows:

"No action, proceeding or suit to set aside, vacate or amend any finding, order or award of the Commission, or referee, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the Commission for a review as herein provided."

No application herein was made to the Commission for a "review," or for a "hearing" save the original hearing upon the claim. Plaintiff contends that the act of 1915 is applicable and that that portion of it, above quoted, does not relate to a review. With this position we can not agree. The "hearing" there referred to is a hearing upon

the "action, proceeding or suit to set aside, vacate or amend," and the construction to be given the section is exactly the construction which the particular language of the act of 1919 makes inevitable. They both mean the same thing. But even this construction is unnecessary because the section is remedial and the law in force January 6, 1920, at the time of the ruling of the Commission is the law applicable. That law is the Act of 1919.

In view of the foregoing the consideration of other incidental questions raised by this record is unnecessary. The judgment is reversed and the cause remanded with directions to the district court to enter judgment affirming the findings and award of the Commission.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 10,241.

THE GENERAL CHEMICAL CO., ET AL. v. THOMAS, ET AL.

Decided January 9, 1922.

Proceeding under the workmen's compensation act. On motion to dismiss writ of error.

Motion Granted.

1. WORKMEN'S COMPENSATION—*Appeal and Error.* A writ of error which is not sued out within the time provided by section 106, chapter 210, S. L. 1919, regarding practice in workmen's compensation cases, will be dismissed on motion.

Mr. FRED W. VARNEY, for plaintiffs in error.

Mr. HENRY E. MAY, Mr. A. J. GOULD, JR., for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS is a writ of error to the Denver district court upon a judgment rendered October 5, 1921, affirming an award by the Industrial Commission in favor of Emily Ann Thomas. Sixty days were allowed for a bill of exceptions which was signed November 10th, and thirty days stay of execution. December 12th this writ of error was sued out.

The Industrial Commission Act, Laws of 1919, page 744, § 106, provides

"The record in any case shall be transmitted to the Commission within twenty days after the order or judgment of the court, unless, in the meantime, a writ of error addressed to the district court shall be obtained from the supreme court, for the review of such order or judgment."

The defendants in error move to dismiss the writ because it was sued out neither within said twenty days nor within twenty days from the expiration of the said thirty days. The motion must be granted.

The plaintiff in error claims that the point was waived, because the defendants in error did not object at the time the thirty days for the bill was granted. Whether this waived the transmission of the record within twenty days from the judgment we do not determine; but it did not waive the requirement that such transmission be made within twenty days from the end of the thirty days stay granted by the court. If the court had power to grant that thirty days at all, which we do not determine, the most that the plaintiff in error could claim for it would be that it postponed the time at which the twenty days began to run, not that it abrogated the twenty day requirement entirely.

It is claimed that since the writ of error was actually issued before the record was transmitted to the commission, it ought not to be dismissed; but this argument is not sound. The words "in the meantime" mean "within the twenty days," not "before the issue of the writ of er-

ror," and the delay of the clerk in transmitting the record, being a disobedience of the law, cannot avail. The statute is an express mandate in form, its purpose is to secure speedy compensation for those in need, to relieve from the law's delay those unable to bear it by doing away with just such delays as have occurred here; it is, then, mandatory in substance. It was the duty of the district court to send the record to the commission as soon as the twenty days expired, or, if the allowance of the thirty days for the bill was proper, then within twenty days from the end thereof.

The motion is granted.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 9342.

DOHERTY & COMPANY, ET AL. v. YOUNGBLUT, ET AL.

Decided January 6, 1922. Rehearing denied February 6, 1922.

Action for the return of irrigation district bonds.
Judgment for plaintiffs.

Affirmed.

1. ADJUDICATED CASES—*Irrigation Districts—Bonds.* See *Doherty & Co. v. Steele*, 71 Colo. 33.
2. EVIDENCE—*Proofs in Possession of Opposing Party.* The fact that one declines to produce documents showing his relations to one alleged to be his agent, is strongly corroborative of any other evidence of agency.
3. IRRIGATION DISTRICTS—*Bonds—Return.* Where one obtains the bonds of an irrigation district with infirmities, and another secures them from him with knowledge of the defects, both are bound to return them, whether the relation of principal and agent exists between them or not.

4. *Bonds Delivered as Partial Performance of Contract.* Where an irrigation district delivers its bonds in partial performance of a contract, which is never fulfilled by the contractor, and the work performed is worthless to the district without the completion of the whole, the consideration should be returned.

Error to the District Court of Morgan County, Hon. H. P. Burke, Judge.

Messrs. BARDWELL, HECOX, McCOMB & STRONG, Mr. PLATT ROGERS, Mr. PERRY D. ROSE, MR. JOHN R. SMITH, Mr. HENRY McALLISTER, JR., for plaintiffs in error.

Mr. WALTER S. COEN, Messrs. MELVILLE, MELVILLE & WALTON, Mr. HUBERT L. SHATTUCK, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE facts in this case are substantially the same as those in 9450, *Doherty, et al., v. Steele, et al.*, 71 Colo. 33, 204 Pac. 77, the only difference being in names and amounts. The decree was substantially like that in the latter case.

There are many points argued, most of which are the same as in *Doherty v. Steele*, and are covered in the opinion therein. We notice here a few of them:

That the plaintiff had no right to bring the action on behalf of the district. This is answered in the opinion in the Steele case. The district itself was a party below and appears here, and asks the relief asked by plaintiff.

It is said the court erred in finding that Doherty & Company were principals. One reason given by the court for so finding was that Doherty & Company had in their possession the written proof of their actual relations with Lucas and did not produce it. Much stress is laid on the proposition that the notices to them and Lucas to produce

the correspondence and papers concerning their relations were insufficient. No notice, however, is necessary to justify the inference of any fact against the party who has the proofs for or against it in his hands and does not show them. Such inference is one of fact and not of law, yet it is often weighty, and, if there is any other evidence of such fact at all, such conduct is strong corroboration.

It is said that the district could not have judgment against both Doherty & Company the principals, and Lucas, their agent. It must elect. Not so; if Lucas got the bonds with infirmities, whether in violation of the contract or otherwise, and Doherty & Company got them from him with knowledge of the defects, both he and they are equitably bound to return them. It is immaterial whether Lucas is their agent; the result is the same.

It is claimed that the plaintiff and other taxpayers of the district were lax in asserting their rights and permitted the contractor to go on after the time for completion had passed and after a legal modification of the contract had been executed; but this, if true, is immaterial. The real basis of the judgment is that the bonds, whether legally or illegally delivered, were conditionally delivered as a partial performance on the part of the district of a contract which has never been performed on the part of the contractors. It would be immaterial what theory the court followed, since the judgment is right; but the court went on the right theory, substantially the same as that of the court in the Steele case, that the contract was for a certain completed irrigation system, that it had not been completed or delivered; that which had been done was worthless without completion of the whole, the district was without fault and therefore the consideration should be returned. If the district, after the time for completion had passed, had stood by and allowed the contractors to complete the system according to the original contract a different question would have been presented.

Plaintiff in error complains that only thirty days were allowed to return the bonds before judgment was to be

entered for their value. The court, however, offered them a longer time but they did not accept.

The judgment is affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE BAILEY, dissent.

MR. JUSTICE BURKE and MR. JUSTICE WHITFORD, not participating.

MR. JUSTICE ALLEN, dissenting:

The views expressed in the dissenting opinion in the Steele case, 71 Colo. 33, 204 Pac. 77, apply with equal force in this case, the two cases being similar in all general features and having been argued and considered together.

No. 9450.

DOHERTY & COMPANY, ET AL. v. STEELE, ET AL.

Decided January 6, 1922. Rehearing denied February 6, 1922.

Action for the return of irrigation district bonds.
Judgment for plaintiffs.

Affirmed.

1. **ACTIONS—Irrigation Districts—Notice.** Where a tax-payer and land owner in an irrigation district brings a suit to compel the return to the district of its bonds, and the district, though in the case as a defendant from the beginning, makes no objection, but asks the same relief as the plaintiff, other parties cannot object that proper notice was not given the district before the commencement of the suit.
2. **IRRIGATION DISTRICTS—Bonds—Wrongful Delivery.** If bonds of an irrigation district are so wrongfully delivered that they ought

to be returned, then they to whom they are delivered should return them, and they cannot relieve themselves of the obligation by transferring them to others, whether those others be holders in due course or not.

3. *Bonds—Return to District.* The fact that the district is not liable on bonds which were wrongfully delivered, is one reason why they should be returned.
4. *ACTIONS—Equity.* There is no distinction in equity between a cause of action *ex contractu* and *ex delicto*. Where equitable jurisdiction attaches and there is ground for relief alleged and proven, such jurisdiction will be retained to do complete justice.
5. *EQUITY—Complaint.* In an action for the return of irrigation district bonds by a tax payer and land owner in the district, the fact that the complaint did not offer to do equity is immaterial under the facts and circumstances in this case.
6. *IRRIGATION DISTRICTS—Bonds—Return.* In an action for the return of irrigation district bonds, a third party to whom they were delivered, having full knowledge of their infirmities should return them, regardless of the relations existing between himself and the party to whom they were originally delivered.
7. *Bonds—Insufficient Consideration.* The delivery of certain rights of way of nominal value to an irrigation district, held not a sufficient consideration for a transfer of bonds of the district of the face value of \$250,000.
If the bonds were delivered as an advance payment in contemplation of the completion of a contract for the construction and delivery of an irrigation system, which was never fulfilled, equity requires the return of the bonds.
8. *Bonds—Delivery—Res judicata.* The contention that the question of proper delivery of irrigation district bonds had been determined in a prior action in another court, held not supported by the record.
9. *Bonds—Conditional Delivery.* Bonds of an irrigation district delivered to one conditioned upon the completion and delivery to the district of an irrigation system, should be returned to the district by one receiving them with notice, where the condition was never fulfilled.
10. *EMINENT DOMAIN—Possession of Right of Way—Effect.* Where a right of way for a ditch has been condemned and the ditch constructed and maintained on the ground for years, it consti-

tutes a taking of the property for which the owner must be paid.

11. IRRIGATION DISTRICTS—*Bonds—Judgment for Return or Par Value*. It was not error to enter judgment for the par value of irrigation district bonds, in case the bonds could not be returned to the district.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. CHARLES F. TEW, MESSRS. BARDWELL, HECOX, McCOMB & STRONG, Mr. PERRY D. ROSE, Mr. HENRY McALLISTER, JR., Mr. PLATT ROGERS, for plaintiffs in error.

Mr. HUBERT L. SHATTUCK, Messrs. MELVILLE, MELVILLE & WALTON, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

STEELE was plaintiff below and obtained a decree requiring Doherty & Company to return to the East Denver Irrigation District certain bonds of that district which had been delivered to them in partial performance of a contract. The facts are fully set forth in the case of *The Antero & Lost Park Reservoir Co., et al. v. Lowe*, 69 Colo. 409, 194 Pac. 945.

Briefly, the district, in 1910, by its board of directors, entered into a contract with a corporation which we will call the Promotion Company, for the purchase of a completed system of irrigation,—reservoirs, canals, gates, etc.,—specified in detail in the contract, with certain water and water rights, all to be paid for by the district in bonds of the district, to the amount of \$3,000,000. The contract provided that the system should be completed and turned over to the district not later than June 1st, 1913. The Promotion Company had a contract with The Antero and Lost Park Reservoir Company for the purchase of its system for \$1,500,000, and were to extend and enlarge it to satisfy the specifications of the contract. In August,

1912, a supplementary contract was made by the authority of the electors of the district and by that contract \$250,000 of the par value of the \$3,000,000 bond issue was authorized to be delivered to the Promotion Company upon the transfer to the district by the Promotion Company of a certain small ditch and certain rights of way for ditches, the whole value of which did not exceed \$6,000; and the time for the completion of the system was extended to January 1st, 1914. The claim of plaintiff was that this arrangement was a subterfuge to avoid the express provisions of the statute in pursuance of which the transaction was had so as to make the advances of bonds on the purchase price of the completed system. In view of the decision we have reached, however, that is immaterial.

No work of any importance was done by the Promotion Company. For a little work, however, they obtained \$18,000 of the bonds and later \$29,000 advance payment on the reservoir called the Irondale, which contained only 800 acre feet of water and was of no value except in connection with the completed system.

The Promotion Company assigned its interests to one Lucas, who, February 3rd, 1913, obtained what was called a modified contract which in the case of *Antero &c. Co. v. Lowe* we held was void. Under the authority of this void contract \$713,500 par value of the district bonds were delivered to Lucas and by him to Doherty & Company, and Lucas, who, it is claimed, was merely a dummy for Doherty & Company, did a large amount of work, but failed to complete the system and has never done so.

The above covers all the essential particulars.

Steele, a taxpayer and landowner of the district, brought this suit on behalf of himself and others, to compel the return of the bonds so delivered, and the court granted the decree upon the theory that the bonds were delivered as an advance payment upon a contract for the purchase of property which, unless completed, was of no value to

the district, and which was to be completed and delivered as a whole.

In this interpretation of the contracts we agree with the court below. It is manifest that the system unless completed was of no value whatever to the district, that it was ruinous to the district to have the completion fail and that the contract required a complete system to be delivered before payment, and we regard those sections of the statute concerning purchase of completed systems as intended to prevent such difficulties as appear in this case.

We notice nine points which the plaintiffs in error have argued:

1. They say that Steele, the plaintiff taxpayer, had no right to maintain the action. The principal grounds of this argument are that the notice, required to be given to the directors before a taxpayer is entitled to bring such an action, was not given, or was not sufficient, and that the choice of remedies was within the discretion of the board of directors and could not be usurped by a taxpayer or by the court.

It is sufficient answer to this that the district itself urged before the court below and urges here the same relief which is asked by Steele, who asks no relief other than that asked by the district. The district, although in the case from the beginning, has never made objection. On what reasonable ground can the other defendants now claim that the district was entitled to the exercise of the discretion of the directors before this suit was begun? Have they not exercised it and are they not exercising it now?

We have been able to find no authority on this question of the attitude of the district; but, if we reverse the case on this ground, we say to the district: "You may not have what you ask because you are not asking for it." "You cannot have what you ask because you have had no opportunity to decide whether you will ask for it."

We cannot see that it makes any difference when the district had exercised its discretion, if it is doing so now. It has not complained of its deprivation, and those who are complaining are doing so against the earnest protest and to the injury of the district.

To dismiss this bill because the plaintiff, Steele, did not take the right formal step at the start, when the real purpose of that step has been accomplished, would be to "twist the strands of precedent into a rope with which to strangle Justice." Our opinion is that this point is not well taken.

The case of *Antero Co. v. Lowe, et al.*, is not in conflict with this conclusion. The plaintiffs in that case, taxpayers of this same district, were seeking to compel the district, against its will, to enforce specific performance of these very contracts, a manifest attempt to usurp the discretion of the district authorities; and in all the Colorado cases cited by plaintiff in error the corporation was resisting the action of the taxpayer or stockholder.

2. It is claimed that the complaint states no cause of action against Doherty & Company because the district seeks the recovery of the bonds and an injunction against taxes to pay them; that that remedy is inconsistent with and a renunciation of the remedy of recovery of the value of the bonds.

If the bonds were so wrongfully delivered that they ought to be returned, then they to whom they were so delivered ought to return them. They cannot relieve themselves of that obligation by transferring the bonds to others, whether those others be holders in due course or not. They are in a position like that of one who has received another's goods and sold them and thus converted them to his own use.

If the bonds were delivered conditionally, as an advance, as the trial court found, then, upon the fulfillment of the condition, i. e., the failure to convey a completed system, they to whom they were so delivered are under obligation to return them, and they cannot relieve themselves of that

duty by a transfer to others, holders in due course or otherwise. If they to whom the bonds were delivered have put it beyond their power to return them, equity is not therefore powerless but will require them to compensate the obligors, according to the elementary equity practice. The equity of the case, stripped of its details, we attempt to illustrate under the discussion of point 7.

3. It is claimed there is no cause of action against Doherty & Company because the complaint shows that the district is not liable upon the bonds. That is one of the reasons why Doherty & Company are obligated to return the bonds, which the decree orders them to do.

4. It is objected that the action was *ex delicto* and the judgment *ex contractu*. It is not important in equity to determine to which grand division of common law actions, *ex delicto* or *ex contractu*, an action belongs. The avoidance of the contract of February 3rd was a sufficient point on which to hang the equity jurisdiction, even if there were nothing more, and, once attached, such jurisdiction would be retained to do complete justice. This is an elementary rule of equity, which has been applied in *Zobel v. Fannie Rawlings Co.*, 49 Colo. 134, 111 Pac. 843; *United Coal Co. v. Canon City Coal Co.*, 24 Colo. 116, 48 Pac. 1045; *Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326. There is no distinction in equity between a cause of action *ex contractu* and *ex delicto*. The question always is: "Is ground for equitable relief alleged and proved?" *Nevin v. Lulu & White S. M. Co.*, 10 Colo. 357, 364, 15 Pac. 611, 614, and many other Colorado cases; *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. See also *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779.

The case of *Connell v. El Paso G. M. & M. Co.*, 33 Colo. 30, 78 Pac. 677, does not support plaintiff in error. In that case there was no allegation or evidence of anything but a fraudulent misstatement of fact. Here there is a complete cause of action alleged and proved, even if we eliminate all allegations and evidence of conspiracy and fraud. That the court will grant relief on any facts al-

leged and proved, see *Kayser v. Maugham*, 8 Colo. 232, 251, 6 Pac. 803; *Powell v. Bank*, 19 Colo. App. 57, 62; 74 Pac. 536; *Jaksich v. Guisti*, 36 Nev. 104, 134 Pac. 452.

5. Reversal is asked because the complaint did not offer to do equity. A taxpayer could not offer the *status quo*. *Miller v. Perris Irr. Dist.*, 92 Fed. 263, 267; *Sechrist v. Rialto Irr. Dist.*, 129 Cal. 640, 62 Pac. 261. The court treated the matter as if equity had been offered and required equity on the part of the district, which was the real plaintiff, at least at the time the case was tried.

The point that the court did not require the district to do real equity is not well taken. The district got nothing of any value. The court gives back everything the district got. True, it is worthless to those to whom it is returned, but it is worthless to the district without the completed system, and, whoever else may be in fault that the system is not completed, the district is not.

6. It is claimed that the district dealt with Lucas as a principal, knowing of his relation to Doherty & Company, the argument being that if Doherty & Company are held it must be upon the theory that Lucas was their agent. Of what consequence is it whether the district contracted with Doherty & Company or Lucas? Doherty & Company got the bonds through Lucas, with full notice of their infirmities. What we have said above shows that Doherty & Company, are bound to return them for that reason, whether the contract be regarded as theirs or Lucas'.

7. The contract of 1912 provided for the delivery of certain rights of way of a value relatively nominal, and it is now claimed that this \$250,000 in bonds ought not to be returned, first, because delivered upon a completed contract, and second, because adjudged properly delivered in a former case, number 774 Adams County district court.

As to the first reason, the court found that these bonds were delivered as an advance payment upon contemplation of the fulfillment of the whole contract and conveyance of a completed system. We think that decision is right. The

equity of this case, stripped of its verbiage, is clear: L. agrees with D. to build a house on Lot 10; to acquire the right to a distant spring, with a right of way for a pipe; to lay a pipe from the spring to the house, and to convey the whole to D., free of incumbrance for \$5,000, to be paid on conveyance. He gets the right of way and conveys it to D., and receives \$1,000 of the \$5,000. He never finishes or conveys the house, spring, pipe or lot. Ought he in equity to return the \$1,000 on the reconveyance of the right of way? The question answers itself. It is absurd and inequitable to suppose that the right of way alone was intended to be purchased by the district without any ditches, reservoirs or water, or without a complete workable system, nor does it appeal strongly to a chancellor to see a consideration of about \$6,000 set up to support the retention of this \$250,000. So true is this that, if the trial court could not have found these bonds to be an advancement, it could hardly have escaped finding a conspiracy to defraud the district.

As to the second reason, we do not find that in the former case, No. 774, in the district court of Adams County, anything whatever was held with reference to this \$250,000. There was a finding that the bonds were delivered "on account and in fulfillment of the contract" of 1912, which is not inconsistent with the finding of the trial court in the present case. No judgment in respect to these bonds was rendered in that suit.

The court below construed the contracts of 1910 and 1912 correctly, that is, that they provided for the delivery to the district of a completed system, not for the construction of a system nor for the delivery of a partial system. In *Antero Co. v. Lowe*, we gave the same construction to the same contracts. The district court held as we did in *Antero v. Lowe*, that the contract of 1913 was void, and correctly held that therefore that instrument had no effect, not even to annul or vary the contracts of 1910, or 1912.

It follows from the construction of these contracts, that

the payment of \$250,000 in bonds must have been as an advance, subject to the completion of the contract, and this relieves us from the necessity of determining whether the contract for these partial payments was valid at all, which we are inclined, with the court below, seriously to doubt.

8. Forty-seven thousand dollars in the bonds of the district were delivered prior to the assignment to Lucas and subsequently acquired by Doherty & Company, as the court finds, with full knowledge of everything affecting them, in pursuance, it is claimed, of a provision of the contract that payment in bonds might be made from time to time. These bonds, like the \$250,000 in bonds above mentioned, were delivered for something that has no value whatever to the district unless the completed system is conveyed to it. These bonds, like the others, then, must be regarded as the court below did regard them, as conditionally delivered, and in equity they should be returned by those to whom they were delivered or those who have received them with notice.

9. The court ordered Doherty & Company to pay to the district the amount of a certain assessment of damages upon condemnation of some of the property intended to be a part of the system. The point is made that this order was error because the district is not liable for that amount, which is about \$13,000, such award not being a judgment but an assessment which the district must pay only in case it decides to take the condemned property.

The defendant in error answers that by saying that, inasmuch as the ditch has been built and maintained for seven years on the ground, that the district cannot now elect to abandon, but must pay. We think that position is correct.

The court intimated that it would give judgment for the par value, which we think is correct, because, when the district has been paid for the bonds, it will owe their par value. It might be reasonable to say, as some of the cases do, that it would be unfair to render a judgment

against one in the position of Doherty & Company, for the par value, and then permit the district to take that money and go into the market and buy the bonds for less; but that is not what the court in this case has done; it has permitted Doherty & Company to go into the market themselves, get the bonds as cheaply as they can, and return them to the district. If they cannot get them for less than the par value, neither could the district.

There are other points which we do not think it necessary to mention here. The decree is fair and equitable and is affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE BAILEY, dissent.

MR. JUSTICE WHITFORD, not participating.

MR. JUSTICE ALLEN dissenting:

I cannot concur in the conclusion reached by the majority, nor agree with the views expressed in the majority opinion.

Neither from the complaint, nor from the evidence, does it appear that plaintiff was entitled to maintain this suit which is based upon a cause of action, if any exists, belonging to The East Denver Municipal Irrigation District. The authorities uniformly hold, at least do the cases decided by this court on that point, and there is no dispute as to this proposition, that a taxpayer or stockholder cannot bring an action upon a cause of action belonging to the municipality or corporation, where the governing board or managing officers of the corporate body has, or have, not wrongfully refused to sue. The rule is too well settled to require discussion. However, attention may be called to the recent case of *Lowe v. Antero, etc. Co.*, 69 Colo. 409, 194 Pac. 945, where, among other things, this court said:

"A taxpayer as a rule in the absence of fraud has no capacity to bring an action for the district against the will, discretion and judgment of the board and the district

in whom are vested by statute the power and authority to exercise such judgment, neither can the court exercise the discretion vested by law in the board or the electors. Discretion exercised by the proper authorities, unless abused, cannot be reviewed by the court at the instance of a tax payer."

There is no question but that the right of action in the instant case belonged to the irrigation district. Whatever may be said as to notice to, or demand of, the district to bring this action, the record shows that the district did not wrongfully refuse to bring suit, and did not abuse its discretion in not instituting litigation. This situation alone is sufficient to show that plaintiff had no capacity to sue.

The majority opinion attempts to meet the situation above pointed out, by relying upon the novel proposition that defendant Doherty & Company cannot object to plaintiff's incapacity to sue because "the district itself urged * * * and urges here the same relief which is asked by Steele" the plaintiff. I do not find that the district urged any relief. It filed an answer, admitting certain allegations of the complaint, and prayed that "it may go hence with its costs." Of course, the fact remains that the district itself did not object to plaintiff's bringing the action, and is not complaining of having been deprived of the exercise of its discretion. This fact appears to be seized upon by the majority opinion, but such fact in no way affects the right of the defendant Doherty & Company to object to plaintiff's capacity to sue.

Plaintiff's right to maintain the action depends on the facts as they existed at the time the action was commenced. If his right then existed, the district could not deprive him of the right to proceed with the action. If his right did not exist, the district could not invest him with such right. In the instant case it is wholly immaterial what attitude the district took after the action was commenced. The plaintiff had control of the suit.

"It is a principle of equity practice, when a person

brings a suit in behalf of himself and such others as may wish to come in who are similarly situated, that the complaining stockholder controls the case and may continue, compromise, abandon or discontinue it at his pleasure until a creditor similarly situated has procured an order to be made a party to the action, or until interlocutory judgment is entered." 3 Cook on Corporations, sec. 748, p. 2738.

The law which prevents a taxpayer or stockholder from suing upon a cause of action belonging to the municipality or corporation is not so much for the benefit of the latter as for the benefit of third persons, against whom the cause of action may exist. Such persons may settle the controversy with the corporation or district without suit. There may often be a reasonable compromise. This reason is apparently recognized in *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, where the court said:

"A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such association to bring suit upon every supposed wrong or injury to the corporation. If it were so, strangers could never know when a settlement, compromise or adjustment was a finality, if the matter was subject to be overhauled at the suit of any discontented shareholder."

The district could not authorize the plaintiff to sue, nor invest him with the capacity to sue by failing to object to his right to maintain the action. Whatever the district may have done, the defendant Doherty & Company is entitled to insist upon and have applied the well settled rule that a taxpayer cannot sue to enforce a cause of action existing in favor of the corporation or district, except when necessary to prevent a failure of justice.

The majority opinion appears to hold that if a suit in equity is brought by a taxpayer, on a cause of action belonging to the corporation or district, the complaint need not offer to do equity because, as the opinion states, "a

taxpayer could not offer the *status quo*." The maxim, "He who seeks equity must do equity," certainly operates in favor of only the party against whom relief is sought, and is applied to promote the ends of justice. A defendant cannot be deprived of the benefits of the maxim or rule simply because the plaintiff or complainant is a taxpayer. If the taxpayer himself, in his individual capacity, cannot do equity, he can ask, and the decree may provide, that the corporation or district may do equity. In *Mosher v. Sinnott*, 20 Colo. App. 455, 79 Pac. 742, a decree was held erroneous because it did not require the corporation to do equity. That was an action brought by a stockholder. The court also held that the complaint failed to state facts sufficient to constitute a cause of action in that it failed to offer to do equity with reference to certain defendants. The complaint in the instant case made no offer to do equity, or make provision whereby equity may be done with reference to the defendant Doherty & Company, and for this reason was demurrable. 21 C. J. 400. The majority opinion assumes that equity was done by the decree. The decree provides that the clerk of the court, as commissioner, "should execute and deliver to Doherty & Company, * * * a deed conveying all right, title and interest the district has to and in the irrigation system and every part thereof."

The decree, in respect to the matter above mentioned, is erroneous for two reasons: First, because the court had no power to convey, or to order a conveyance of, the "irrigation system and every part thereof." The property was acquired by the irrigation district under a statute which provides, in section 3452 R. S. 1908, as follows:

"The title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act. * * *

The property was, therefore, inalienable. If the dis-

trict could not convey, a court could not direct a conveyance. The second reason why the decree is erroneous, in this connection, is that equity is not done to the defendant Doherty & Company by transferring to it the irrigation system. A conveyance of the bare bones of systems, whose only value depended upon the appurtenant lands, would not in any just sense be a restoration of the *status quo*. What would be conveyed, would have little, if any, value to the defendant.

If there is no other way of doing equity than by such conveyance as is provided for in the decree, then it is impossible to do equity, in which event the action cannot be maintained. Plaintiff should have been left to pursue his remedy in an action for damages. *Auld v. Travis*, 5 Colo. App. 535, 544, 39 Pac. 357.

The majority opinion takes up the discussion of another point in the case by stating that "it is objected that the action was *ex delicto* and the judgment *ex contractu*." I think the contention of the plaintiff in error, in this connection, is not as stated in the words above quoted, but is in the language of one of the headings in a brief, namely, that "the whole structure of the complaint was founded on active, fraudulent conspiracy, and proof thereof failing, (it) should have been dismissed."

The allegations of conspiracy saturated the complaint. The court found that there is not sufficient evidence to sustain plaintiff's charge of conspiracy. The complaint is too lengthy, even so far as conspiracy is concerned, to be here reviewed, and the allegations cannot be summarized in a brief space. In view of the allegations in this case, I am unable to agree with the majority opinion that the rule controlling here is simply, "Is ground for equitable relief alleged and proved?" The rule to be applied is that stated in 21 C. J. 674, as follows:

"If by its allegations the bill is framed for relief upon a certain and definite theory, relief must be granted on that theory or not at all."

In a note, citing a large number of cases, it is said, in 21 C. J. 675:

"Where the bill is framed on the theory that there was fraud entitling plaintiff to relief, it must be proved as laid in order to warrant a decree in plaintiff's favor; relief will not be granted on proof of other facts, although included in the charge of fraud and sufficient under some circumstances to constitute a claim for relief under another head of equity."

The trial court, upon its finding, above mentioned, should have dismissed the complaint.

Another reason why the judgment should be reversed is that the complaint states no cause of action against Doherty & Company. The Gas Securities Company is made a defendant. The complaint alleges that The Gas Securities Company is now the owner and holder of the bonds, and that it acquired the bonds with full notice of all matters affecting the validity of the bonds, and prays that this company be compelled to bring in the bonds for cancellation. It thus appears from the complaint that the bonds are not valid, outstanding obligations of the irrigation district. This being true, it was impossible for the complaint to state a cause of action for a money judgment against the defendant Doherty & Company for the face, or any, value of the bonds in the hands of such a purchaser, and the decree to this end, based upon such a complaint, is erroneous. The conclusion above stated is further aided by the fact that the plaintiff took default against the Gas Securities Company. Nothing stood in the way of full relief against the Securities Company, and the court, in its original findings, held that the Securities Company should be compelled to return the bonds. This finding was changed in the final decree, the court then holding that the plaintiff is not entitled to any relief against The Gas Securities Company, and thereby the court, rather than the plaintiff, made the action really one against Doherty & Company. But the complaint still failed to state a cause of action against this defendant, because the allegations

with reference to the Securities Company negated a cause of action against Doherty & Company.

If the plaintiff or the district was entitled to some judgment against Doherty & Company, it would not be a judgment for the return of the \$250,000 in bonds delivered under the contract of 1912. The decree, providing for the return of such bonds, should not be affirmed. In this connection, it may be assumed, as the trial court found, that the original contract, called the contract of 1910, was for an entire irrigating system for the entire price. If bonds were delivered under the contract of 1910, they may have been mere advances and subject to recovery if the entire system were not completed. However, under the contract of 1912, the bonds were not delivered as advances, but were delivered upon a completed contract, namely the contract of 1912. It may be true, as stated in the majority opinion, that the consideration for the \$250,000 bonds was worth only \$6,000, but the district got all it contracted for in the 1912 contract. When it received what it contracted for, it delivered the consideration moving from it, the \$250,000 in bonds. It delivered them in pursuance of a complete and completed contract, and not as a partial payment on an uncompleted contract. The contract of 1912 was entered into not only by resolution of the board of the district, but upon vote of the electors, and constituted a solemn obligation of the district. The court erred in ordering any judgment, based on the delivery of the \$250,000 in bonds above mentioned.

The decree orders defendant Doherty & Company to bring in and deposit with the clerk of the court, \$47,000 of the district bonds which, under the court's findings, the defendant obtained from the Promotion Company. These bonds were delivered to the Promotion Company under the original contract, and prior to the assignment of contracts to Lucas or Doherty & Company, and were given in pursuance of a provision of the original contract that payment in bonds might be made from time to time. These bonds were delivered under circumstances similar

to those attending the delivery of \$40,000 in bonds to Russell, Clark, and the Interstate Trust Company, which bonds, and the delivery thereof, were held valid by this court in *Interstate Trust Co. v. Steele*, 65 Colo. 99, 173 Pac. 875. That decision settles the validity of the delivery, and of the bonds, in this case, so far as concerns the \$47,000 in bonds, above mentioned. The decree is based on the theory that if the Promotion Company still had these bonds, it would be compelled to return them to the district because the irrigation system was not completed, and that Doherty & Company received them from the Promotion Company with notice. Under the decision in the first Steele case, above cited, the Promotion Company would not have to return them, and hence the reason for the decree does not exist. At any rate, the bonds were valid in the hands of the Promotion Company, and could be transferred by it to any purchaser and the latter's right to said bonds could not be affected by any subsequent failure to complete the contract. Doherty & Company, as to these bonds, is in the position of such purchaser. It was error to include these bonds in the judgment.

The decree orders Doherty & Company to deliver up \$673,500 in bonds, within ninety days, and, in effect, the decree further provides that on failure to deliver the bonds, there shall be a money judgment against the company "for the par value of the bonds and coupons." Judgment for the par value of the bonds is unwarranted either by the allegations of the complaint or by the evidence. The par value of bonds or notes which have not been paid is, as a general rule, recoverable when they have been procured by false and fraudulent representations and have been fraudulently put into circulation. That is, where the manner of their being procured and disposed of necessarily excluded the possibility of any equities on the part of the alleged wrong-doer. The trial court erred in applying the foregoing test, which applies only to illegal and fraudulent transactions. It does not apply in this case. The court found there was no fraud. If any money judg-

ment is recoverable, it is for the damage which is suffered by the district by the failure to return the bonds. The measure of damages is not the par value of the bonds but their present market value. In other words, it is what it would cost the district to procure the bonds. This is the rule adopted by the Supreme Court of the United States in *City of Memphis v. Brown*, 20 Wallace, 289, 22 L. Ed. 264, the court there said:

"If Brown & Co. have received bonds of the city, which they are bound to return, and do not return, what damage does the city suffer? The face of the bonds and interest, it is said, as if they run to maturity, the city will then be liable for the payment of the whole amount. Not so. * * * The value of its bonds in the market is fifty cents on the dollar. With that amount of money it can now place in its treasury the bonds Brown & Co. fail to return. It is difficult to see that the damage sustained can be beyond that amount."

It is no answer to this that, as stated in the majority opinion, Doherty & Company can go into the market themselves and get the bonds. That consideration can have no legitimate influence, any more than the contention made in the case above cited, relating to the ability of the city to go into the market to buy the bonds. This court should not ignore a rule of law simply because a way may be found by the defendant to avoid its application. The *City of Memphis* case should be treated as authoritative in this court. In *Hayden v. Town of Aurora*, 57 Colo. 389, 142 Pac. 183, we said:

"It is the policy of this court, declared again and again, in the absence, as in this case, of constitutional or statutory inhibition, or contrary holdings of its own, to follow decisions of the Federal Supreme Court, and it therefore becomes not only a duty, but our pleasure to now do so."

The majority opinion concludes with the statement:

"The decree is fair and equitable and is affirmed." As to the proposition that the decree is "fair and equitable" the conclusion of the majority opinion seems to be based

on the reasoning that the work done by the contractor "is worthless to the district," because not a "completed system," and therefore the district should recover back everything it paid or advanced under any of the contracts.

An irrigation system may be useless until completed, but it is not, on that account, worthless. Whatever has been done short of completion, means that that much has already been done, and need not be performed again, whenever steps are or may be taken to build a complete system. According to the decree, Doherty & Company received, on account of what was done, \$683,000.00 in bonds. Doherty & Company did not obtain these bonds by fraud. They received them for moneys advanced, property rights procured, material and labor, and pursuant to contracts, including the valid contracts of 1910 and 1912. The defendant is compelled to return all of these bonds, and is allowed to retain nothing. It receives no compensation for work done, or property procured, and no reimbursement for moneys advanced. It receives only a worthless title to the incompleted irrigation system, and the majority opinion concedes that "it is worthless to those (Doherty & Company) to whom it (the system) is returned." The defendant is therefore required to sustain a loss, and a very heavy one, represented by what it gave as the consideration for the \$683,000.00 in bonds, and it is to be presumed that the consideration was fair and adequate, the record showing nothing to the contrary.

The defendant, Doherty & Company, is certainly entitled to the reasonable value of whatever it gave for the bonds, if the judgment for their return is to be upheld. It is an elementary rule that where labor is performed or materials furnished by one person for another under a contract which for reasons not prejudicial to the former is or becomes unenforceable, he may recover therefor upon a *quantum meruit*. 40 Cyc. 2825. Equitable considerations which support this rule existed in the instant case, but equity to defendant was neither offered by plaintiff

nor done by the decree. The decree is unfair and inequitable and ought to be reversed.

I am authorized to state that Mr. Justice Bailey concurs in this dissent and agrees with the views herein expressed.

NO. 9545.

THE ROCKY MOUNTAIN MOTOR CO., ET AL. v. WALKER.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Action in replevin. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—Practice.** Questions not presented in compliance with court rules 8 and 31, will not be considered.
2. **TRIAL—Nonsuit.** Where the evidence is in conflict on all issues raised by the pleadings, the questions are of fact for the jury. In such circumstances a motion for nonsuit should be denied.
3. **INSTRUCTIONS—Partnership.** Propositions of law should be concretely stated and not in the abstract, and the entire law upon any one proposition should, so far as practicable, be embodied in one instruction.

A requested instruction on partnership held faulty as omitting personal responsibility for partnership engagements and losses.

4. **Joint Ownership.** An instruction on this subject should tell the jury what in law would constitute joint ownership, and not leave to them the determination of the legal question

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. JOHN T. BOTTOM, for plaintiffs in error.

Mr. L. J. STARK, for defendant in error.

MR. JUSTICE WHITFORD delivered the opinion of the court.

IN the trial court defendant in error was plaintiff and the plaintiffs in error were defendants. The parties will be denominated as in the court below.

This is an action in replevin brought by the plaintiff to recover from defendants two automobiles. The defendants contend that the plaintiff and defendants were partners and joint owners of the two automobiles. The evidence was conflicting. The verdict and judgment were for the plaintiff.

The defendants cannot be heard on many of the questions which they now seek to have reviewed here, because of their omission to observe the requirements of rules 8 and 31 of this court.

Error is assigned in denying the motion for a non-suit. The court committed no error in so ruling. The evidence was in sharp conflict on all the issues raised by the pleadings and presented questions of fact for the determination of the jury, and not questions of law for the court.

The defendants reserved one exception only to the instructions given, and that was waived by not incorporating it in their motion for a new trial, as required by rule eight of this court.

Another assignment of error is the refusal of the court to charge the jury as follows:

"The court instructs the jury that to constitute a partnership, as to partners themselves, it is only necessary that each of them contribute their capital, labor and credit, or skill and care, or two or more of these, and that all the contributions are put together into a common stock or a common enterprise, to be used for the purpose of carrying on business for the common benefit."

This is a request to have the court state to the jury a naked legal proposition of law. This court has repeatedly

said that in instructing the jury, "propositions of law should be concretely stated and not in the abstract, and that the entire law upon any one proposition should, so far as practicable, be embodied in one instruction." *Denver Cons. E. Co. v. Walters*, 39 Colo. 301-312, 89 Pac. 815, 818. But the proposition of law attempted to be stated in the request is faulty, at least in one important particular, in omitting the personal responsibility for partnership engagements and losses. There was no error in refusing this request.

The refusal of the court to give the instruction requested on joint ownership was not error. It submitted to the jury to determine for itself what constituted joint ownership. The request should have told the jury what in law would constitute joint ownership, and if the jury found certain facts from the evidence specified by the court, that such a finding of fact by them would amount to joint ownership.

We find no reversible error. Affirmed.

MR. JUSTICE TELLER and MR. JUSTICE ALLEN concur.

No. 9921.

DYER, ET AL. v. BENGTON.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Action on promissory note. Judgment for defendant.

Reversed.

1. FRAUD—*Defense—Burden.* The burden is upon defendant to establish the defense of fraud by clear and convincing proof.

Evidence reviewed and held not to sustain the burden in this case.

Error to the District Court of the City and County of Denver, Hon. Francis E. Bouck, Judge.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. ELMER L. BROCK, for plaintiffs in error.

Mr. PAUL W. LEE, Mr. GEORGE H. SHAW, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

THE parties here occupy the same relative position as in the trial court. Plaintiffs, who are brokers, had a contract with The Wright Producing & Refining Company for certain of its stock. They obtained this from the corporation at \$2.37½ per share and sold 2000 shares of it to defendant at \$4.00 per share. Defendant executed his notes for the purchase price and upon his failure to pay these and take the stock plaintiffs brought this action for damages in the sum of \$3250, being their profit of \$1.62½ per share lost by defendant's failure to comply with his contract. The defense relied upon was fraud. Verdict was returned in favor of defendant and to review the judgment thereupon entered plaintiffs bring error. The answer contains the following allegation:

"The said plaintiffs, * * *, did further represent unto the defendant that the market price of the said stock and the lowest price at which the same could be obtained was the sum of \$4.00 per share."

If the judgment be sustained it must be upon that allegation and the evidence in support of it. All other allegations of fact concern matters of opinion, future contingencies, and legitimate "puffing", or were wholly unsupported by evidence.

The strongest, and practically the only, evidence concerning the alleged representations as to market value is the following testimony of the defendant, given on cross-examination:

"Q. Mr. Bengtson, you testified that Mr. Dyer said to you that this stock was worth \$4.00 a share? A. Yes sir.

Q. What did you understand from that? A. Well, that is the way I understood it.

Q. Did you understand that to be the current price at which the stock was selling, or the price at which the company was offering the stock, or did you merely understand it to be his opinion as to what the stock was worth? A. He said the stock was worth \$4.00 a share and I took that to be the market price of it.

Q. He did not say that was the market price did he? A. Well, he said that was the price of it."

The strongest, and practically the only, evidence concerning the alleged representations as to the price at which the stock could be obtained at the time was the following testimony of defendant given on direct examination:

"Did he tell you that the stock could not be offered to the public at less than \$4.00 a share. A. Well, he said it was worth \$4.00 a share."

It will thus be observed that defendant made no claim that the *market price* was expressly represented to him to be \$4.00 a share, or even that he so interpreted the statement of Dyer. He says that he "took that to be the market price" but it does not definitely appear that he so "took" it from what Dyer had said. It will furthermore be noted that in answer to a leading question on the subject of the price at which the stock could be obtained defendant declined to make the answer put in his mouth by counsel.

If we could say from the foregoing that the rule requiring proof of fraud by evidence conclusive and satisfactory had thus been met, it still devolved upon the defendant to show the falsity, at the date thereof, of this representation concerning value. The only attempt to meet this requirement was by the introduction of evidence, indefinite and unsatisfactory, as to the price at which this stock had been sold a considerable time prior

to the date of the contract and at which it was offered for sale at a considerable time thereafter. Admitting the correctness of all this evidence it constitutes no proof of the falsity of plaintiffs' representations of a "market value" of \$4.00 per share (if any such were in fact made) at the time of the contract.

The sole defense to this action was fraud and the burden rested upon defendant to establish it by clear and convincing proof. That burden he wholly failed to sustain. Plaintiffs' motion for a directed verdict should have been granted. The judgment is reversed and the cause remanded with directions to enter judgment for plaintiffs.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT.

MR. JUSTICE ALLEN dissents.

MR. JUSTICE BAILEY not participating.

No. 9962.

BURKE v. THE SOUTH BOULDER CANON DITCH CO.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Action for damages occasioned by alleged negligent operation of an irrigating ditch. Judgment for defendant.

Reversed.

1. NEGLIGENCE—*Defense—Custom.* On an issue of negligence the defendant cannot prevail by showing that someone else has committed the same act as that which is charged as an act of negligence.

2. **DAMAGES—Evidence—Error.** In an action against an irrigating ditch company for damages to land occasioned by alleged negligent operation of their ditch, it was error to admit in evidence, over objections by plaintiff, an arbitration agreement for the construction of the original ditch of smaller size and which did not contemplate one of the size and capacity, for the negligent operation of which damages were claimed.

It was also error to admit in evidence the findings of the referee and adjudication decree concerning the original ditch, of which the ditch complained of was an extension.

Error to the District Court of Boulder County, Hon. George H. Bradfield, Judge.

Mr. O. A. JOHNSON, for plaintiff in error.

Mr. F. S. LEUTHI, for defendant in error.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff below in an action against defendant in error for damages alleged to have resulted from the negligent operation of an irrigation ditch on plaintiff's land. The defendant had judgment and plaintiff brings error.

It appears from the record that the defendant's principal canal approached within about one-half mile of the defendant's land, and that from the main canal a ditch was constructed, in 1882, across an eighty-acre tract owned by defendant, which ditch was to supply water to the lands of one Price to the east of defendant's land. This extension ditch was constructed under an arbitration agreement, entered into between the land owners affected by it in 1882, in which year also in a general adjudication proceeding the defendant was awarded a decree for a large quantity of water, as of a date some years previous.

The testimony of plaintiff is to effect that this extension ditch when first constructed was from three and a half to four feet wide at the bottom, five feet at the top and fourteen to sixteen inches deep; that it carried at first from

three hundred to four hundred inches of water. Some years later water was furnished through it to another farmer, and still later water was run through said ditch to supply the town of Erie. He testified further that there had recently been flowing through the ditch an average of three thousand inches. The testimony shows that the ditch has been increased in depth and width, until shortly before the trial it averaged seven feet and two inches in depth, and twenty-one feet in width, being at some places as wide as thirty-two feet. The fall across the eighty acres, as testified to by plaintiff's engineer, was eleven and thirty-eight hundredths feet.

Plaintiff testified as to the amount and value of the land destroyed or injured by the ditch; also that he had for years been endeavoring to induce the owners of the ditch to take steps to prevent its continued widening and deepening, to put in "stops," or small dams, at intervals, to check the flow, but without having secured any action in the matter.

It is urged as error that evidence was admitted, over repeated objections thereto, as to the grade, depth and condition of other ditches in that vicinity. In short, the attempt was to establish a *custom* of constructing and operating ditches, and to show that other ditches were worse, or at least no better, than was this ditch, in the matters of which complaint is made.

On an issue of negligence the defendant cannot prevail by showing that some one else has committed the same act as that which is charged as an act of negligence.

In *Jenkins v. Hooper, et al.*, 13 Utah, 100, 44 Pac. 829, the court had under consideration a judgment in an action for damages resulting from the negligent care of an irrigation canal.

Evidence was admitted as to the custom in the cleaning of other ditches; held error. The court said:

"The care and attention which the law required the defendants to give to their ditch, by way of cleaning it out, or otherwise, could not be tested by the amount of care

and attention given by other companies to theirs. The men in charge of their ditches might have been careless or prudent. They may have exercised reasonable care, or they may not have done so. * * * The true standard by which to test the charge of negligence was one of prudence and care. * * * The care or negligence of other men in charge of other ditches was not material to the issue in this case."

In *Earl v. Crouch*, 16 N. Y. Supp. 770, the court said that upon the issue of negligence the question is not what other men have done, but what men ought to do.

In *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986, a negligence case, the court said:

"It was a simple question of fact for the jury to determine whether, under the particular circumstances and conditions shown to exist in the case, the defendants had omitted any precautions which ordinarily careful and prudent men in the same relation would not have omitted, or performed any acts which ordinarily prudent men would not have performed. * * * It is impossible, in the first place, that there should be any uniform practice or fixed standard of care, with respect to a duty so peculiarly dependent upon varying circumstances and conditions as that of guarding fire to prevent its spreading. * * * Not even a general custom can be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions."

In *Deering on Negligence*, section 9, it is said:

"It may be stated as a general rule that where a party is charged with negligence, he will not be allowed to show that the act complained of was customary among those engaged in a similar occupation, or those placed under like circumstances and owing the same duties."

In *Hill v. Winsor*, 118 Mass. 251, the court said:

"There is no rule of law which exempts one from the consequences of his negligent conduct upon proof that he proceeded in the usual manner and took the usual course pursued by parties similarly situated, * * *. The de-

fendants cannot protect themselves by proving the careless practices of others."

It was also urged as error that the court admitted in the evidence the arbitration agreement. Clearly that agreement had no bearing upon the question at issue. It had to do with damages for the right of way for the extension ditch. As the evidence of the defendant's president shows that the ditch was made by plowing three furrows, and was only six feet wide at the bottom, it is impossible that that agreement should have contemplated such a ditch as is now on the land.

It is also urged as error to admit the original adjudication decree, and the findings of the referee, which formed the basis of the decree. They had to do with the main canal, which did not even touch the township in which plaintiff's land lies.

Counsel for defendant in error contends that the evidence as to custom was justified by the introduction of evidence as to custom by one of the plaintiff's witnesses.

A question put to him was whether or not caving of the banks of a ditch constructed as theretofore stated, was usual and "customary". It had nothing to do with the custom of building or maintaining ditches.

The evidence as to custom was very likely to lead the jury to suppose that such custom settled the question as to the proper method of operating ditches. Likewise, the admission of the arbitration agreement, and the original decree tended to confuse the jury, and almost certainly misled them.

There was error, therefore, in all of these matters for which the judgment must be reversed, and it is so ordered.

MR. JUSTICE ALLEN and MR. JUSTICE BURKE concur.

No. 9965.

DAILY WAIST COMPANY v. HARRIS.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Petition in district court for writ of *certiorari*. Petition dismissed.

Reversed.

1. *CERTIORARI—Code and Statutory Provisions.* The remedies under statutory section 3840, R. S. 1908, and section 331 code, 1908, discussed and distinguished.
2. *Statutory Remedy.* The rule that the only question to be determined on a writ of *certiorari* is whether the inferior tribunal has exceeded its jurisdiction or greatly abused the discretion allowed it, has reference only to proceedings brought under the code. It is entirely inapplicable to proceedings before a justice of the peace, in which the party may ignore the code remedy and proceed solely under the statute.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOL, for plaintiff in error.

Mr. WILLIAM A. BRYANS, JR., for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS cause is before us upon writ of error to the district court of the City and County of Denver to review a judgment dismissing a petition for a writ of *certiorari*.

The petition recites certain alleged proceedings in a justice court, including an attachment and judgment against the petitioner, who was defendant in the action before the justice of the peace. The writ prayed for is one requiring the justice of the peace to certify to the district court a transcript of the judgment and other proceedings had before him, including all papers filed and

issued by said Justice in the action. It thus appears that the plaintiff in error, petitioner below, is proceeding under, or may rely upon, the provisions of the statute relating to justices and constables, particularly the sections thereof concerning the remedy afforded by the writ of *certiorari*.

The record presents for our determination the question whether the petition for the writ states facts sufficient to authorize the issuance of the writ under that statute, particularly section 3840, R. S. 1908, which reads as follows:

"The petition, on application for writs of *certiorari*, shall set forth and show upon the oath of the applicant that the judgment before the justice of the peace was not the result of negligence of the party praying for such writ, that the judgment, in his opinion, is erroneous and unjust, setting forth wherein the error and injustice consists, and that it was not in the power of the party to take an appeal in the ordinary way; setting forth the particular circumstances which prevented him from so doing."

The petition alleges, in substance, that all of the proceedings before the justice were had without notice to the defendant, and that he had no notice of the pendency of the action in time to appeal from the judgment; that the judgment was rendered on June 24, 1920, and a letter dated July 14, 1920 was sent by plaintiff's attorney to defendant's attorney informing them that plaintiff had secured a judgment; that at the time when defendant was thus notified of the judgment the time allowed by law for taking an appeal had long expired, and the defendant could not for that reason take an appeal in the ordinary way. The petition alleges that the judgment was not the result of defendant's negligence. It further alleges, in substance, that no cause of action existed against defendant but that defendant has a just claim against plaintiff in the sum of \$312.75.

The petition fully complies with the requirements of section 3840 R. S. 1908, as contended by plaintiff in error. The defendant in error does not controvert this proposi-

tion, but contends that the trial court properly dismissed the petition because the same, and also the transcript of the proceedings in justice court, fail to show any irregularity in the proceedings. He then proceeds to quote from numerous opinions of this court and of our Court of Appeals where it was held, as in *Ellis v. People*, 15 Colo. App. 341, 345, 62 Pac. 232, that the proceedings in *certiorari* "are not had on the merits of the controversy, nor does the court go further * * * than to ascertain whether the court below had jurisdiction to proceed." The cases cited by him are to the same effect as the recent case of *State Board of Medical Examiners v. Boulls*, 69 Colo. 361, 195 Pac. 325, where this court said that "the only question to be determined on a writ of *certiorari* is whether the inferior tribunal, or board, has exceeded its jurisdiction, or greatly abused the discretion allowed it."

The rule thus stated, in the case above cited, has reference only to proceedings upon writ of *certiorari* when brought under the provisions of the Code of Civil Procedure of 1908, section 331 thereof. In *Wood v. Lake*, 3 Colo. App. 284, 33 Pac. 80, it was held that the chapter concerning *certiorari* in the Code is entirely inapplicable to proceedings before a justice. This holding was modified in *Union Pacific Co. v. Wolfe*, 26 Colo. App. 567, 574, 144 Pac. 330, by the explanation that the Code provision is applicable "where questions of jurisdiction only are to be reviewed." Under the case last cited, a party may ignore the Code remedy, and proceed, as did the defendant in the instant case, solely under the statutory remedy. The opinion further states:

"The statutory writ may be issued by judges of the District and County Courts, but only to remove causes from before Justices of the Peace. Its purpose is to bring the case up for trial *de novo* upon the merits. It is a mere substitute for an appeal."—*State v. Harcourt*, 38 Colo. 243, 247, 88 Pac. 255—and is granted only when, for some reason, it is not within the power of the party to take an appeal in the ordinary way; and upon a petition showing

that the judgment before the justice was not the result of applicant's negligence; that the judgment, in his opinion, was erroneous and unjust, wherein such error and injustice consists, and the particular circumstances which prevented applicant from taking an appeal in the ordinary way. It provides no remedy for excess of jurisdiction or want of jurisdiction of the person."

To the same effect is the case of *Jones v. Rice*, 63 Colo. 112, 164 Pac. 1162.

The court erred in dismissing the petition. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,232.

WEIR, ET AL. v. WELCH.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Action in unlawful detainer. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. **PLEADING—Unlawful Detainer—Replication.** Our unlawful detainer act makes no provision for a replication, and the necessity therefor has been excluded.
2. **ACTIONS—Equitable Defense—For the Court.** Where the sole issue in an action is raised by an equitable defense, its determination is for the court, and not a jury.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. F. W. SANBORN, Mr. HERBERT MUNROE, for plaintiffs in error.

Mr. KENT S. WHITFORD, Mr. HARRY C. DAVIS, Mr. STANLEY T. WALLBANK, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFFS in error were defendants and defendant in error was plaintiff in the trial court, and the parties are hereinafter so designated.

Plaintiff brought this action in unlawful detainer, and from the judgment entered therein against defendants they bring error and ask the issuance of a *supersedeas*. Two assignments only are relied upon. 1. The refusal of the trial court to grant defendants ten days in which to demur or move against the replication. 2. The refusal of the trial court to grant defendants' motion for trial by jury.

1. That portion of section 66 of the Code (R. S. 1908, p. 86) upon which the first assignment of error is based reads as follows:

"The defendant may, within ten days after the service of a notice in writing upon himself or attorney that a replication has been filed, demur thereto for insufficiency, or to any part thereof, or may move to strike out the same or any part thereof, for any cause which may exist, therefor."

Our unlawful detainer act makes no provision for a replication and it has been held that the necessity therefor has by implication been excluded. *Joss v. Hallett*, 39 Colo. 392, 396, 89 Pac. 809.

2. The real property in question had been sold under execution and plaintiff, having purchased an outstanding judgment, redeemed from the sale as a judgment creditor,

One of the defenses was that the funds so expended were advanced by plaintiff to one of defendants as a loan; wherefore it was alleged that plaintiff held this property in trust for defendants under a contract by virtue whereof the sheriff's deed became a mortgage to secure the repayment. This was the sole issue tried below and it is contended that under section 190 of the Code (R. S. 1908, p. 111) it should have been submitted to a jury. Said section reads, in part, as follows:

"In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered, as provided in this code."

This defense was equitable and its determination was for the court. Under a state of facts very similar we said:

"The issue upon the legal cause of action alleged in the complaint should have been submitted to the jury, if there was any dispute concerning it. At the trial, however, defendants conceded that the legal title was in plaintiffs, and there was no evidence at all contradicting it, so there was no legal question to try or submit, and the only evidence was that pertaining to the equitable defense. This evidence might have been submitted to the jury for their finding upon it, but if so, their verdict thereon would be merely advisory to the court. * * * This being true, it was entirely competent for the court, at the close of defendants' testimony, if satisfied that the equitable defense had not been sustained, to take the case from the jury and enter judgment for the plaintiffs." *Davis v. Holbrook*, 25 Colo. 493, 495, 55 Pac. 730.

Neither assignment is well taken. The *supersedeas* is denied and the judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT, MR. JUSTICE BAILEY and MR. JUSTICE WHITFORD, not participating.

No. 10,144.

PEOPLE, EX REL. FULTON v. O'RYAN as President of the
State Board of Charities and Corrections, et al.

Decided January 9, 1922. Rehearing denied February 6, 1922.

Mandamus to compel the payment of the salary of a
state official. Writ discharged.

Reversed.

1. CONSTITUTIONAL LAW—*Appropriation Bills*—*Title*. Attempted action of the legislature to create a new office in an appropriation bill, would be void under article 5, section 32 of the Constitution relating to appropriation bills, and article 5, section 21, regarding titles of acts.
2. OFFICERS—*Void Legislation*. Attempt by the legislature in an appropriation bill to legislate one out of office and put another in, held void as being in contravention of article 5, section 32, article 5, section 21, and the civil service amendment of the Constitution.
3. STATUTES—*Continuing Appropriation*. An act providing that an official shall be paid an annual salary, to be paid in the same manner as expenditures of the executive department are paid, construed to be a continuing appropriation for the payment of such salary.

The effect of a continuing appropriation is the same as if the appropriation had been written in the appropriation bill.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. FRANK McLAUGHLIN, for plaintiff in error.

MR. VICTOR E. KEYES, attorney general, Mr. CHARLES ROACH, deputy, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

MANDAMUS to compel payment of relator's salary as secretary of the state board of charities and corrections. The writ was discharged.

The relator was secretary of the state board at the time of the passage of the so-called Civil Service Amendment to the Colorado Constitution, and it is conceded that she is a state officer under its terms, and she has not been removed nor has there been any attempt to remove her. Among the duties of the board, prescribed by the act establishing it, (R. S. 1908, C. XXII), is investigation of penal, charitable and other institutions. The relator performed this duty under the board's regulations.

The Legislature of 1921, in the general appropriation bill, made no provision for the salary of the secretary, but appropriated \$1800 for the salary of "Investigator (male)". There is no such office as investigator, statutory or constitutional.

If this was an attempt to create a new office, that of investigator, it was a violation of the provision of the Constitution, Art. V, § 32, which provides that the general appropriation bill "shall embrace nothing but appropriations" and also of Art. V, § 21, with reference to titles of bills, and so void. If it was an attempt to legislate the relator out of office and put another in, it was void for the same reasons and also because in violation of the civil service amendment, for it is evident that if the legislature may merely change title of an office and attach the duties and salary of the old name to the new one, the civil service amendment is a nullity. *State ex rel. v. Burdick, State Auditor*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266; *Reid v. Smoulter*, 128 Pa. St. 324, 18 Atl. 445, 5 L. R. A. 517. See also *State, etc. v. The Mayor, etc. of Nashville*, 15 Lea (Tenn.) 697, 54 Am. R. 427; *Bd. of Supervisors De Soto Co. v. Westbrook*, 64 Miss. 312, 1 So. 352; *State, etc. v. Shreveport*, 124 La. 178, 50 So. 3; *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. 1034; *Carr, Auditor v. State, &c.*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624; *Morris v. Glover*, 121 Ga. 751, 753; 49

S. E. 786; *Thomas, Comptroller, v. Owens, Treas.*, 4 Md. 189; 1 Kent Com., 281. To prevent such things was the purpose of the amendment. *People ex rel. v. Bradley*, 66 Colo. 186, 190, 179 Pac. 871.

It is argued with some force that under these conditions we ought to construe the appropriation as intended for the secretary, but we do not find it necessary to decide that question. We think that chapter XXII, R. S. 1908, contains a continuing appropriation.

In *People ex rel. v. Goodykoontz*, 22 Colo. 507, 45 Pac. 414, the act establishing the office of steam boiler inspector, which provides that "said inspector shall receive an annual salary of \$2,500 * * * payable as other state officers," was held to be a continuing appropriation, because the amount of the salary, the time and the method of payment were fixed by law. This case was approved and distinguished in *Leddy v. Cornell*, 52 Colo. 189, 120 Pac. 153, 38 L. R. A. (N. S.) 918, Ann. Cas. 1913C, 1304.

In the present case the act provides that the secretary "shall be paid for his services * * * such annual salary as shall be agreed upon by the board. All accounts and expenditures shall be paid in the same manner as the expenditures of the executive departments of the state are paid." The salary has been agreed upon by the board. The case stands, then, on the same ground as the *Goodykoontz case*, *supra*. See also *State v. Burdick*, *supra*, citing opinions of the Colorado Attorney General. *Reid v. Smoulter*, *supra*.

It is urged that there is no fund out of which to pay the relator's salary, but the effect of the continuing appropriation is the same as if the appropriation for the Secretary's salary had been written in the appropriation bill. *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111, quoted in *State v. Burdick*, *supra*. See also *People ex rel. Hegwer v. Goodykoontz*, 22 Colo. 507, 512, 45 Pac. 414. If there is no other fund available the eighteen hundred dollars mentioned in the appropriation bill is available for that purpose.

The judgment should be reversed with directions to make the writ peremptory.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9761.

THE INTERNATIONAL STATE BANK *v.* MCGLASHAN, ET AL.

Decided February 6, 1922.

Action in debt against the officers and directors of a corporation. Judgment of dismissal.

Reversed.

1. **APPEAL AND ERROR—*Bill of Exceptions—Waiver.*** When a party signs and approves a bill of exceptions, and permits it to be allowed by the judge without objection, he waives the right to thereafter object on the ground that it was not tendered in time.
2. **CORPORATIONS—*Annual Report.*** The annual report required to be filed by corporations under the provisions of chapter 102, S. L. 1911, must comply with all of its requirements. The act and each part thereof is mandatory, and a failure to give all the information specified, renders a pretended report a nullity.
3. **PLEADING—*Cause of Action.*** In an action against the officers and directors of a corporation to make them personally responsible for a debt of the company, the contention that the complaint does not show that the debt was originally contracted within the statutory period, held untenable in the case under consideration.
4. ***Amendment—Limitations.*** An amendment to a complaint which sets up no new cause of action, but simply perfects one already stated, relates back to the time of the commencement of the action and the running of the statute of limitations against the cause of action so pleaded is arrested at that time.

Error to the District Court of Las Animas County, Hon. A. C. McChesney, Judge.

Mr. JESSE G. NORTHCUTT, Mr. A. W. MCHENDRIE, for plaintiff in error.

Mr. HENRY HUNTER, Mr. JAMES MCKEOUGH, Mr. J. J. HENDRICK, Mr. A. E. MCGLASHAN, Mr. HORACE N. HAWKINS, for defendants in error.

En banc.

MR. JUSTICE WHITFORD delivered the opinion of the court.

PLAINTIFF in error brought suit against the defendants in error, seeking to recover from the defendants personally, as officers and directors of The Trinidad Garage Company, certain debts of the corporation because of the failure of the corporation to file, within sixty days next after the 1st day of January, 1918, an annual report as required by chapter 102, Session Laws 1911. The act requires every corporation to file an annual report with the Secretary of State within sixty days next after the 1st day of January in each year, and prescribes what such report shall show, as follows:

First. The names of its officers and their several places of residence, together with the street or business address of such officer.

Second. The names of its directors or trustees and their several places of residence, together with the street or business address of such director or trustee.

Third. The amount of its capital stock as fixed and determined by its Articles of Incorporation and amendments thereto.

Fourth. The proportion of said capital stock actually paid in.

Fifth. Setting forth how the same was paid, whether in cash, by the purchase of property, or otherwise.

Sixth. The amount of the indebtedness of said corporation at the date of filing said report.

Seventh. Setting forth whether or not it is engaged in the active operation of its business within the State of Colorado.

Eighth. Such other information as will show with reasonable fullness and certainty the condition of its real and personal property, and the financial condition of such corporation, joint stock company or association at the date of filing such report.

The law further provides that if any such corporation neglects to file an annual report within the time prescribed, that the officers and directors of such corporation shall be jointly, severally and individually liable for all of its debts contracted during the year next preceding the time when the report should have been filed, and until such report is filed.

At the trial there was received in evidence, without objection, a certified copy of the purported annual report of The Trinidad Garage Company, filed in the office of the Secretary of State February 23, 1918, which was made out on a blank form provided by the Secretary of State for such reports, which form follows numerically and almost literally the language of the subdivisions of the statute.

The sixth, seventh and eighth subdivisions of the purported annual report as filed are as follows:

Sixth. Amount of indebtedness at date of filing this report.

Seventh. State whether or not engaged in actual operation within the State of Colorado.

Eighth. Such other information as will show with reasonable fullness and certainty the condition of real and personal property, and the financial condition of your company at the date of filing this report.

Assets.

Capital Stock	10000.00
Used Cars	3700.00
New Cars	10382.73
A-C's Rec.	6248.45
Stock	22660.00

Fixtures, Mach.	3500.00	\$56491.18
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Liabilities.

Bills Payable	23000.00	
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Bills Payable		
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Secured by cars.....	19545.33	
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A-C's Payable	4762.38	\$47307.71
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At the conclusion of the plaintiff's testimony, the trial court granted a non-suit and dismissed the cause upon the ground that the report was a substantial compliance with the requirements of the statute.

Judgment was rendered November 14, 1919, and sixty days allowed for a bill of exceptions. On the sixty-first day thereafter, counsel for defendants in error, with no intimation of protestation, approved the bill of exceptions and delivered it to counsel for plaintiff in error, and on the same day the trial judge, without objection, signed and sealed the same.

It was moved in this court on behalf of defendants in error, to strike the bill of exceptions for the reason that it was signed and sealed one day too late, which motion was granted.

In the brief and oral argument of plaintiff in error we are asked to reconsider the motion to strike and re-instate the bill of exceptions. Since the granting of the motion to strike, this court said, in *Mogote-Northeastern Consolidated Ditch Co. v. Gallegos*, 69 Colo. 221, 193 Pac. 670:

"If the plaintiff's attorney desired to object to the signing of the bill, he should have added to his memorandum the statement that he objected to the signing because it was too late, as in *Bell v. Murray*, 13 Colo. App. 217, or have gone before the court with his opponent and objected there. * * * We think that whenever an attorney approves a bill of exceptions and permits it to be allowed without making the objection that it is too late, he should be regarded as waiving that objection and consenting to the allowance. * * * Such a rule is fair to all par-

ties, tends to prevent disaster to litigants through fraud or misunderstanding, and is the reasonable interpretation of the approval or the statement that the bill correctly states the proceedings." *Rose v. Agricultural Ditch & Reservoir Co.*, 69 Colo. 232, 193 Pac. 671; *R. G. S. R. R. Co. v. C. F. & I. Co.*, 41 Colo. 3, 91 Pac. 1114; *Hoover v. Shott*, 66 Colo. 456; 182 Pac. 883; *E. I. Dupont, etc. Co. v. Smith*, 249 Fed. 403, 161 C. C. A. 377.

We think that when the attorneys for defendants in error signed the bill of exceptions approving the same, without noting any objections thereon, and permitted the judge thereafter to allow the bill, without making objection thereto, the defendants in error consented to the allowance of the bill and waived the right to thereafter object. The bill of exceptions will be reinstated.

In preparing its annual report the corporation made no answers to subdivision sixth and seventh of the purported report filed with the Secretary of State. These subdivisions sixth and seventh are constituent parts of the statute, which specifically state what, among other things, the report shall show. To eliminate them from the statute would be doing violence to the manifest intention of the legislature. To ignore these requirements in making the report would be doing violence to the specific provisions of the act. The document which was filed as an annual report did not comply with the plain mandates of the law. These provisions of the act cannot be ignored in making the report. The section, and each part thereof, is mandatory. *C. F. & I. Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834; *Cannon v. Breckenridge Mercantile Co.*, 18 Colo. App. 38, 69 Pac. 269; *Thatcher v. Solomon*, 16 Colo. App. 154, 64 Pac. 368.

We said in *Moody v. Rhodes Ranch Egg Co.*, 61 Colo. 368, 157 Pac. 1167, where it appeared that no answer was made to the eighth subdivision of the report filed with the Secretary of State:

"By its failure to contain material matter required by the plain provisions of the statute, the purported annual

report was in law no report."

So we conclude that the failure to state in the report the amount of the indebtedness of the corporation at the date of the report, and omitting to state whether or not it was engaged in the active operation of its business within the state, invalidates the report.

The matters stated in subdivision eighth of the report are not sufficient to cure the omissions in the sixth subdivision of the report because of obvious inaccuracies. The statements in the eighth subdivision, of the assets and liabilities of the corporation, are obviously incorrect and unreliable. The palpable error in omitting the capital stock from the statement of the corporate liabilities and including it in the assets would make the total indebtedness, as there denominated in figures, a matter of speculation and conjecture. The statement is not reasonably full and certain, as expressly required by the act. It cannot, therefore, be held to be a statement furnishing "the information as will show with reasonable fullness and certainty the condition of its real and personal property and the financial condition of the corporation", nor can it be said to be sufficient to supply the information omitted in the sixth subdivision of the report.

This purported annual report is a nullity, and in law is no report.

It is contended by defendant in error that the complaint does not state a cause of action for several reasons. One is that it does not show that the debt was originally contracted within the statutory period. The statute provides that the officers and directors shall be severally and individually liable for "all debts * * * that shall be contracted during the year next preceding the time when such report" shall be filed. The complaint alleges that on certain dates between February 23 and March 15, 1919, "the said, The Trinidad Garage Company * * *, for a good and valuable consideration, promised and agreed in writing to pay to the International State Bank, on demand, the amounts hereinafter mentioned and set out." Here is a

promise, based upon a valuable consideration, to unconditionally pay a fixed sum of money at a time certain, which sufficiently shows a debt contracted within the statutory period. There is no merit in this contention.

Another point urged is that there was no cause of action stated until the complaint was amended, which was made after the action was barred by the statute of limitations. The rule of law upon this subject is that an amendment to a complaint which sets up no new cause of action or makes no new demand, but simply perfects and extends the averments in support of the cause of action already stated, relates back to the time of the commencement of the action, and the running of the statute against the cause of action so pleaded is arrested at that time. The Missouri Supreme Court says:

"Amendments are allowed expressly to save the cause from the statute of limitation, and courts have been liberal in allowing them, when the cause of action is not totally different." *Lottman v. Barnett*, 62 Mo. 159-170.

The Montana court states the rule thus:

"A general demurrer to the complaint was sustained, and the court properly allowed the plaintiff to amend. The amendments supplemented the allegations of the original complaint, perfected the only cause of action claimed by the plaintiff, and therefore related back to the date of filing the original complaint." *Clark v. Oregon Short Line*, 38 Mont. 177, 99 Pac. 298.

The rule is well stated in the case of *Boudreaux v. Tucson Gas, Electric Light & Power Co.*, 13 Ariz. 361, 114 Pac. 547, 33 L. R. A. (N. S.) 196:

"Where the original complaint fails to state facts sufficient to constitute a cause of action tested by a general demurrer, an amendment filed after the bar of the statute of limitations is complete is not subject thereto, provided the facts stated in the original complaint are sufficient when read in the light of the amendment to disclose that such amendment is but the perfection of the imperfect statement of the cause of action originally attempted to be

pleaded and not the statement of a new or different cause of action."

The amendments allowed were by interlineations, one of which was for the purpose of showing consideration for the agreement, which was as follows: "For a good and valuable consideration." The other was to negative the presumption of payment of the indebtedness by the corporation, which was: "Or by the said, The Trinidad Garage Company." It is manifest that these amendments made by interlineation did not and could not change the cause of action. The amendment was to perfect the allegations of the same cause of action incompletely alleged in the original complaint. The contention of the defendants in error cannot be sustained.

The order reinstating the bill of exceptions dispenses with the necessity of considering other points argued in the briefs.

The judgment is reversed and the cause remanded.

MR. CHIEF JUSTICE SCOTT not participating.

No. 9808.

THE WEST ELK LAND & LIVESTOCK COMPANY v. TELCK.

Decided February 6, 1922.

Action for injunction and damages. Injunction denied and judgment for plaintiff for damages.

Modified and Affirmed.

1. INJUNCTION—*Remedy at Law*. An injunction is properly denied where the plaintiff has a complete remedy in damages at law.

2. **PLEADING—Amendment.** A plaintiff who is permitted to amend his complaint "to conform with the proof", cannot complain of a judgment for damages which gives him the amount asked by the amendment.
3. **INTEREST.** It is the rule in this state that interest can only be recovered in the cases enumerated in the statute.

Error to the District Court of Garfield County, Hon. John T. Shumate, Judge.

Mr. C. W. DARROW, Mr. CALDWELL YEAMAN, for plaintiff in error.

Mr. J. W. DOLLISON for defendant in error.

MR. JUSTICE WHITFORD delivered the opinion of the court.

IN the trial court defendant in error was plaintiff, and the plaintiff in error was defendant. The parties will be designated as in the court below.

The plaintiff commenced his action in October, 1910, for injunctive relief and for damages. The court denied the injunction, but gave judgment for damages. The defendant brings error and the plaintiff assigns cross error.

It appears that one Samuel Egan, in 1888, settled upon a portion of the unsurveyed public lands of the United States and continued to occupy the same with his family until his death in 1900. In September, 1904, Egan's successors in interest quitclaimed their possessory rights and the improvements made by Egan to the plaintiff for the sum of eighty-five dollars. Prior to the purchase and settlement by plaintiff the Government established a forest reserve now known as the White River National Reserve, which embraced the lands claimed by plaintiff. Plaintiff was ordered to vacate by the officials of the Forest Reserve, and after three years' absence was reinstated and the lands claimed by him surveyed and segregated from the Reserve. In June, 1909, plaintiff filed his homestead entry and subsequently, on May 9, 1916, a patent was issued to him by the Government.

The defendant's grantor in April, 1906, initiated proceedings under the statutes and acts of Congress for a reservoir site for irrigation purposes, which included 7.21 acres claimed by the plaintiff and on which were situated his buildings and improvements. Plats of the reservoir were filed with and approved by the Secretary of the Interior. In June, 1911, the defendant completed the construction of the reservoir at a cost of about eleven thousand dollars. The waters of the reservoir flooded and destroyed plaintiff's buildings. In October, 1910, defendant commenced the construction of its reservoir to prevent which plaintiff, on October 24, 1910, filed his complaint against defendant for a temporary injunction and for \$100 damages. A temporary injunction was ordered November 2, 1910, against defendant from interfering with plaintiff's property situated on said lands, upon condition that plaintiff execute an injunction bond in the sum of \$500.00. Plaintiff failed to file the required bond, and no injunction was issued. The defendant filed a general demurrer and thereafter no proceedings whatever were had in the case for more than eight years, when, on December 6, 1918, which was two years after the issuance of plaintiff's patent and seven years after the completion of the reservoir, plaintiff filed an amended complaint alleging his damages at \$100, and praying for an injunction the same as prayed for in his original complaint. The trial was to the court. The court denied the injunction and awarded in its findings damages in the sum of \$400 and interest from October 12, 1910. By leave of court the plaintiff then amended his amended complaint by interlineation, increasing the averments of the *ad damnum* clause from \$100 to \$400, and had judgment entered for that sum.

The court very properly denied the injunction. The plaintiff had a complete remedy, in damages, at law. At the time of instituting his suit he was awarded a temporary injunction, but did not avail himself of it but delayed, without any reason for so doing, until the dam-

age was complete before he brought his case to trial.

The court awarded \$400 damages in its findings and then gave plaintiff leave to amend his amended complaint. Thereupon plaintiff, after amending by interlineation, added the following: "Plaintiff by leave of court has amended his amended complaint by alleging damages in the sum of \$400, said amendment being made to conform to the proof in said cause." After the court denied the injunction, plaintiff amended his amended complaint, fixing by averment the amount of his damages at \$400, and the court entered judgment for the full amount demanded by him. He alleged that the amendment conformed to the proof. We think plaintiff can not now complain.

In entering judgment the court permitted the plaintiff to recover interest from October, 1910. This part of the judgment can not be sustained. It is the rule in this state that interest can only be recovered in the cases enumerated in the statute. *D., S. P. & P. R. R. Co. v. Conway*, 8 Colo. 1, 5 Pac. 142; *Young v. Kimber*, 44 Colo. 448, 98 Pac. 1132, 28 L. R. A. (N. S.) 626.

The judgment will be modified by the disallowance of interest. As thus modified, the judgment will be affirmed.

MR. JUSTICE TELLER and MR. JUSTICE DENISON concur.

No. 9940.

CALLAHAN v. FRASER, ET AL.

Decided February 6, 1922.

Action for conveyance of interest in mining property.
Judgment of dismissal.

Affirmed.

1. PLEADING—*Amendment—Dismissal.* Demurrer to a complaint being sustained, plaintiff was given twenty days to amend and make a tender of the alleged purchase price of an interest in property. Failing to amend and make the tender, the action was properly dismissed.
2. OPTION—*Conveyance of Interest in Property.* The owner of an undivided interest in a mining lease and option is not entitled to the conveyance of an interest in the property on a tender of his proportionate share of the purchase price, the option being for a sale of the entire property.
4. ACCOUNTING—*Right to.* One holding an undivided interest in a mining lease and option, and claiming to be a part owner by right of purchase, is not entitled to an accounting as such owner until he establishes his right to the interest.

*Error to the District Court of Saguache County, Hon.
Jesse C. Wiley, Judge.*

Mr. S. M. TRUE, for plaintiff in error.

Mr. CARLE WHITEHEAD, Mr. ALBERT L. VOGL, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE errors assigned in this case are that the court erred in sustaining demurrers to plaintiff's second amended complaint and in dismissing the action.

The complaint alleged that plaintiff purchased an un-

divided one-eighth interest in a mining lease and option, the remaining interests in which were afterwards purchased by the defendants in the suit, defendants in error here.

It is further alleged in the complaint that plaintiff and defendants, as owners of said lease and option, agreed to take up the option, making full payment of the purchase price of said property; that plaintiff appeared at the appointed place, prepared to pay her portion of said purchase price, but that the other parties did not comply with their agreement in respect to the purchase; that she thereupon tendered to the owner of the property her certified check for \$2,500 her share of the purchase price; that thereafter, defendant Fraser, acting in the interest of his co-defendants, purchased the property, subject to the lease and option.

The complaint also alleges that the defendants are operating said property, taking large bodies of ore therefrom. She prays that she may be permitted to pay into court \$2,500 for her one-eighth interest, and be adjudged an owner of the property to that extent; and that an accounting be had as to the proceeds of the mine.

When the demurrers were sustained, twenty days were allowed to plaintiff to amend her complaint, and in which to tender into court the sum of \$2,500. Plaintiff neither amended her complaint, nor made any tender of the money within the twenty days, or at all. The action was thereupon dismissed.

It is clear that plaintiff's tender to the owner of the property gave her no rights, because the option was not for a sale of an eighth interest, but of the whole property. The contract alleged being one in which payment was a condition precedent, she could not demand a conveyance without tendering payment. This fact is recognized by plaintiff in the prayer of her complaint by asking leave to pay the required sum into court as the basis of her right to the conveyance.

The requirement that she make a tender was justified,

and plaintiff is in no position to complain of it. She had no right to an accounting because she had not yet established a right to the interest, and could not do so, until she had tendered to the owners of the property the purchase price of the interest claimed. The defendants, be it observed, are, according to the complaint, the owners of the property, and of the lease and option.

Finding no error in the record, the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9966.

LEACH v. TORBERT, ET AL.

Decided February 6, 1922.

Action involving the redemption of land from foreclosure sale by a judgment creditor. Judgment of dismissal.

Reversed.

1. **TRUST DEED—Foreclosure—Redemption by Judgment Creditor.** The term "judgment creditor", as used in section 2, chapter 112, S. L. 1917, concerning redemption of land from foreclosure sale by a judgment creditor, means judgment creditor of the person whose land shall be sold under execution. The statute refers only to creditors having judgments or decrees capable of enforcement by sale of the land to be redeemed.
2. **PLEADING—Allegations of Title.** An allegation of ownership in fee in one party, negatives record title in someone else; and a denial of every title whatsoever, is a denial of record title.

Error to the District Court of Weld County, Hon. George H. Bradfield, Judge.

Mr. JOHN R. SMITH, Mr. RICHARD E. LEACH, for plaintiff in error.

Mr. HENRY HOWARD, JR., Mr. WALTER E. BLISS, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit in which a judgment creditor seeks to redeem land of the debtor which had been sold under a decree foreclosing a deed of trust, to compel the sheriff to accept the proper amount of redemption money, and to cancel certain instruments involving, and resulting from, a redemption or attempted redemption by another judgment creditor. A demurrer to the complaint was sustained, and the cause was dismissed. The plaintiff brings the cause here for review.

The facts shown in the complaint, and which are admitted by the demurrer, are as hereinafter stated.

On May 31, 1918, and at all such times thereafter as are mentioned in the complaint, the land involved in this suit, consisting of a quarter-section in Weld County, was owned by one Edward L. Heald and one C. B. Bingaman, each of whom held in fee an undivided one-half interest. The land was subject to certain reservations of the Union Pacific Railway Company, and also to a certain deed of trust to secure the payment of certain promissory notes. On the date above mentioned, one E. Clifford Heald, who was then the owner and holder of the notes and the beneficiary of the deed of trust, commenced an action in the district court of the City and County of Denver, seeking a judgment on the indebtedness and other relief, including a decree of foreclosure of the deed of trust.

On September 4, 1918, E. Clifford Heald obtained the decree of foreclosure as sought by him. On October 14, 1918, the sheriff of Weld County, which is the county wherein the land is situated, sold the premises in accordance with the decree, and upon the sale the land was struck off and sold to the above named Clifford Heald for the

sum of \$2,018.76, and a certificate of purchase was issued to him.

On the date above mentioned, and at all times since, the plaintiff in the instant case, Richard E. Leach, was a judgment creditor of Edward L. Heald, and as such judgment creditor, Leach sought to redeem the property on July 12, 1919, which was after the expiration of six months and before the expiration of nine months from the date of the sheriff's sale, above mentioned. The complaint alleges the proper tender to the sheriff. No other judgment creditor of Edward L. Heald has redeemed the land from the sheriff's sale of October 14, 1918. Neither has the land been redeemed by a judgment creditor of any defendant in the foreclosure suit having any interest in the land. The sheriff of Weld County refuses to allow the plaintiff to redeem.

Prior to plaintiff's attempt and offer to redeem, namely, on May 10, 1919, there was a redemption made, or attempted to be made, by one W. R. Torbert. At that time, and ever since July 10, 1918, there was on file in the office of the Clerk and Recorder of Weld County, a transcript of a judgment docket, reading as follows:

"STATE OF COLORADO, }
City and County of Denver. } ss.

W. R. Torbert, Judgment Cr. & Plaintiff, vs. WILFRED J. HEALD and Ed- ward L. Heald, Judgment Dr. & Defendant.	} In the District Court. April Term, 1918. Transcript of Judgment Docket. No. 55625.
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Judgment entered in said court on December 11, 1917, against the defendants and in favor of the plaintiff for \$10,428.28 and \$55 costs.

7/5/1918. This Judgment satisfied in full as to Edward L. Heald. See satisfaction in files."

At the time the transcript was filed, the judgment described therein had been fully paid and satisfied as to Edward L. Heald.

It appears from the complaint that when Torbert attempted to redeem the land, he did so as a judgment creditor, not of Edward L. Heald, but of Wilfred J. Heald, and at all the times herein mentioned, Wilfred J. Heald had no estate, right, title, or interest whatever in the land, or any part thereof. Torbert levied execution against the land to satisfy his judgment against Wilfred J. Heald, and bid in the property, and received a sheriff's deed.

The plaintiff in the instant case seeks to have the sheriff's deed set aside, also the proceedings leading to the issuance of the deed, to set aside Torbert's redemption from the foreclosure sale of October 14, 1918, and to be himself allowed to redeem the land from such sale.

Section 3653 R. S. 1908, as amended by chapter 112, p. 426, Session Laws of 1917, allows judgment creditors to redeem lands sold by virtue of any execution. There can be no question but that the plaintiff is such a judgment creditor as is entitled to redeem from execution sale the land of his debtor, Edward L. Heald. On the other hand, Torbert is not entitled to redeem the land, because *his* debtor, Wilfred J. Heald, has no interest in or title to the land. The term "judgment creditors," as used in the statute, means judgment creditors of the person or persons whose lands shall be sold under execution. The statute refers only to creditors having judgments or decrees capable of enforcement by a sale of the land to be redeemed. *DeWitt County Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304. Torbert had no judgment capable of enforcement by levy on and sale of the land. His debtor had no title to nor interest in it. Torbert cannot divest plaintiff of his right to redeem. The allegations of the complaint present a question which may be stated in simple form as follows: A's land is sold under an execution. Can B's judgment creditor, after the time for redemption by A has expired, levy an execution against B on the land of A and, receiving a sheriff's deed as redeeming judgment creditor, thus defeat the

judgment creditors of A and prevent A's judgment creditors from satisfying their judgments from A's land? No reason exists why the question should be answered otherwise than in the negative.

The complaint states a cause of action. It was error to sustain the demurrer.

The defendants in error assert that the complaint is silent as to the "record title," and it is suggested that possibly Wilfred J. Heald had a record title and that the same is not negatived by any allegations of the complaint. This argument, if material, is not borne out by the record. The complaint alleges ownership in fee in Edward L. Heald and C. B. Bingaman. This imports the record title in them and negatives record title in some one else. Again, the complaint alleges that Wilfred J. Heald had "no estate, right, title or interest whatsoever," in the land. It is also alleged that Torbert was not a judgment creditor of anyone who had "any estate, right, title, or interest whatsoever in said lands." All this is a good denial of record title in Wilfred J. Heald and of judgment creditorship in Torbert. A denial of every title whatsoever is a denial of record title. The statute, section 3613 R. S. 1908, provides that "every interest in land, legal and equitable, shall be subject to levy and sale under execution." The complaint clearly negatives, by express allegations, any such interest in the land held by Wilfred J. Heald.

The case of defendants in error rests upon allegations of fact and alleged admissions in oral argument in trial court wholly outside the record and denied in the briefs of plaintiff in error.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings in harmony with this opinion.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BURKE concur.

No. 9975.

COOPER v. WOODWARD.

Decided February 6, 1922.

Action on contract. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—*Sufficient Evidence.*** A verdict supported by sufficient evidence will not be disturbed on review.
2. **CONTRACT—*Construed.*** A contract for the management of a theater providing for monthly settlements for the business of the four weeks last preceding such settlement, construed to mean final monthly settlements, and not tentative, to abide the result of a final settlement at the close of the entire period.
3. ***Construction—Ambiguity.*** Courts will not so construe a contract as to render it uncertain, and then admit evidence to explain the ambiguity.
4. **APPEAL AND ERROR—*Instructions—Harmless Error.*** An instruction which submits to a jury the question of the construction of a contract, while erroneous, is harmless error if in favor of the complaining party.
5. ***Instructions—Requests for.*** If any points are omitted from the court's instructions, the error will not be considered on review in the absence of proper requests by the complaining party.

*Error to the District Court of the City and County of
Denver, Hon. Greeley W. Whitford, Judge.*

Messrs. GILLETTE & CLARK, for plaintiff in error.

Mr. J. W. KELLEY, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error was defendant, and defendant in error was plaintiff, in the trial court, and they are herein-after so designated.

Plaintiff brought suit for the recovery of \$1000 and interest alleged to be her share of undivided net profits on a certain written contract for the management of the Denham Theater in the city of Denver. Under this contract O. D. Woodward was employed by defendant to manage the theater and was to receive,

“One-half of the net profits of said theater after the payment of all expenses of the conduct thereof excepting rent, with the right to draw weekly on account of his share of said profits the sum of \$50.00. It is understood and agreed that the said Woodward shall render to said Cooper on each week a statement of all the receipts and expenses of said theater for the last preceding week and that settlements shall be had between said parties upon the thirteenth day of August, 1916, and upon each fourth Monday thereafter for the business of the four weeks last preceding such settlement. It is agreed that upon each said settlement the \$50.00 per week drawn by said Woodward on account shall be charged against his one-half of the net profits, and that if upon any such settlement one-half the net profits shall not be as great as the amounts by said Woodward so drawn the difference shall be adjusted as soon as the net profits will permit, upon future settlements, it being the meaning and intent of the parties that said Woodward shall receive as full compensation one-half of said net profits with a guarantee of \$50.00 per week. It is agreed that if said business is not successful said Cooper may cancel this contract at any time upon giving two weeks’ notice thereof to said Woodward, and at the end of said two weeks said Cooper shall pay to said Woodward the difference between the total amount by said Woodward then received under this contract and the sum of \$500, it being the agreement of the parties that said Woodward shall, in any event, and regardless of the length of time the said theater shall be operated, receive at least the sum of \$500. * * * It is further agreed that all season tickets sold and outstanding prior to July 7, 1916, for performances thereafter

at the said Denham Theater, shall be honored at any performances thereafter given and that these said season tickets will not be taken into account in considering the receipts of the said business after the said July 16, 1916, but it is especially provided that this arrangement shall not extend to season tickets in any total sum above the sum of \$1474."

This contract was assigned by O. D. Woodward to his wife, the plaintiff. The assignment is not in dispute.

The theater was operated accordingly for approximately eleven months and until the contract was terminated on June 9, by defendant giving the two weeks' notice provided for therein. In the management thereof O. D. Woodward represented plaintiff and transacted all business for her. At the close of the period he claimed a balance due plaintiff of \$1000 and made out a check for the amount which defendant refused to sign. Due demand was thereupon made and upon refusal plaintiff brought this suit. The cause was tried to a jury which returned a verdict for plaintiff in the sum of \$1016.56. To review the judgment entered thereon defendant sues out this writ.

The theater was operated at a profit for the first five months, at a loss of \$524.46 the sixth, at a profit of \$789.05 the seventh, and at a loss for the remainder of the time. For the first five months settlements were made and profits divided as called for by the contract. From the profits of the seventh month the losses of the sixth were deducted and the balance divided, by check to defendant and credit to plaintiff on her overdraft. For ten months \$50.00 a month, or a total of \$550.00, was credited to a so-called "reserve account" and not included in the estimates. This "reserve account" was a mere matter of book-keeping. No such account was actually maintained, but \$50.00 a month was applied to the payment of expenses which Cooper had contracted to take care of. Plaintiff's suit is for one-half of this \$550.00 "reserve account" plus one-half of the \$524.46, December losses de-

ducted from January profits, plus her share of season tickets unaccounted for, and for interest. The correct amount for season tickets was a question of fact to be determined by the jury by deducting from the total season ticket sales those used prior to the beginning of the period of continued loss. There was evidence to support this part of the verdict and we see no reason to consider it further. The dispute regarding the items of \$550.00 and \$524.46 depends wholly upon whether under this contract monthly settlements were final, or merely tentative settlements to abide the result of a final settlement and accounting at the close of the entire period. Plaintiff claims the former, defendant the latter.

It is said on behalf of defendant that the January settlement, from which the December loss was deducted, and of which both parties were cognizant, shows their construction of the contract in favor of defendant and is binding upon the court. Standing alone this fact would be persuasive if not controlling. It is said on behalf of plaintiff that the first five months' settlements and the failure to deduct from these months, or any of them, the December loss at the time of the settlement for that month, all of which was known to both parties, shows their construction of the contract in favor of plaintiff and is binding upon the court. Standing alone this fact would be persuasive if not controlling. Both these considered together, however, show, if they show anything, that the parties construed this contract one way five times and another way the sixth. If the construction of the parties is to be depended upon the preponderance is in favor of the plaintiff. The December losses were deducted from the January profits, before division, by the book-keeper. He did this on his own motion and without knowledge of the provisions of the contract.

If defendant's interpretation be the correct one the losses for every month other than December, when there was a loss, should first be made good out of the profits of the first five months. Under this rule plaintiff has al-

ready received more than \$3000 which she should return. Defendant makes no such claim.

The contract specifically provided for future "adjustments" when at the time of any settlement one-half the net profits would be insufficient to pay Woodward's weekly guarantees. No other future adjustments are provided for and all such are by implication excluded. The interpretation defendant now insists on is that of final settlements at the end of each month, save only in case of loss for a given month followed by profits for a succeeding month.

It is urged that the rule of interpretation in *Taylor v. Thomas*, 31 Colo. 15, 71 Pac. 381, supports defendant's contention. We do not so read the authority. The interpretation there given rested upon the phrases, "total receipts from the lease" and "total expenses of the lease", whereas this contract provides for monthly settlements "for the business of the four weeks last preceding such settlement." There are many other material differences. If these monthly settlements were final the language is unambiguous. If merely tentative it is misleading. Courts will not so construe a contract as to render it uncertain and then admit evidence to explain the ambiguity.

Twenty-four instructions were given the jury. Defendant objected to numbers 2, 3, 4, 13 and 20. No. 4 submits to the jury the question of construction. This was error but being favorable to defendant is without prejudice. It is unnecessary to examine numbers 2, 3, 13 and 20. They accord with our view of the case as above set out and correctly state the law. If any points were omitted counsel for defendant should have made the proper requests. The record discloses but three, which were denied. One of these instructs the jury that net profits should be computed for the entire term; another applies the same rule to the "reserve account"; another advises the jury that the contract is ambiguous. All three were erroneous and properly refused.

Finding no reversible error in the record the judgment is affirmed.

MR. JUSTICE TELLER, sitting as Chief Justice, dissents.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9982.

In the Matter of the Estate of MICHAEL BUBSER, Deceased.

BUBSER v. HERRMANN.

Decided February 6, 1922.

Application for widow's allowance. Application denied.

Affirmed.

1. **PROBATE LAW—Widow's Allowance.** The purpose of the allowance is to provide for the comfort and sustenance of the widow and children pending administration and before distribution.
2. **Widow's Allowance—Widow Residing Outside of State.** A widow who has lived apart from her husband for three years, and is residing outside of the state and maintaining herself at the time of his death, which occurred in this state, is not entitled to a widow's allowance under our statutes.
3. **Widow—Domicile—Statutory Construction.** Under our statutes regarding widow's allowance, the residence of a widow may be elsewhere than the state of her husband's domicile at the time of his death.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

MR. THEODORE THOMAS, for plaintiff in error.

Mr. DOUGLAS A. ROLLER, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error made application for a widow's allowance as the widow of Michael Bubser, deceased, under a section of the statute which provides that "if any decedent leaves a widow residing in this state, in all cases she shall be allowed to have and retain as her sole and separate property," certain named articles to be taken under what is generally known as a widow's allowance. It appeared that some three years prior to the death of Bubser, plaintiff in error went to the state of Iowa, and remained there until the death of her husband. She was there engaged in managing a rooming house a part of the time. She did not correspond with her husband during her absence. An objection was made to the allowance upon the ground that the applicant was not residing in this state at the time of the death of Bubser. The county court sustained the objection, and on appeal to the district court, the objection was there sustained. The cause is before us on error to the order disallowing the claim.

For the plaintiff in error it is contended that our statute is, on this question, identical with that of Illinois, and two cases from that state are cited in support of the contention of plaintiff in error that her residence was at the domicile of her husband. Neither of those cases involve this question. The same may be said of the two Missouri cases cited, since in the statute of Missouri there is no requirement that the widow be residing in the state.

The purpose of the allowance has been stated by this court to be "to provide for the comfort and sustenance of the widow and children pending administration and before distribution". *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1096, Ann. Cas. 1916C, 863. This is a correct statement of the purpose of the statute, and a limitation of its benefits to a widow residing in the state, and dependent

upon the estate after the death of the husband, as she had depended upon him before his death.

In this case, since the widow was residing apart from her husband, discharging no duties toward him, and maintaining herself, the reason of the statute does not apply. The allowance is a substitute for support theretofore furnished by the husband. The thing for which the allowance is a substitute not having existed, there is no reason for the allowance.

Plaintiff in error contends that inasmuch as the domicile of the husband is, ordinarily, the domicile of the wife, and presumed so to be, the plaintiff in error must be regarded as residing in this state at the time of the death of her husband. This is to obliterate the distinction between a mere residence and a domicile, a distinction well established, and nullifies the words of the statute "residing in this state." If a widow is held to be residing wherever the domicile of her husband is, the words of the statute just quoted have no effect whatever. Wherever the widow might be living, she would, in law, under that theory, be residing at the domicile of her husband.

We are called upon to give effect to all the provisions of the statute, and if we do so, we must hold that a widow may, at the time of the death of her husband, be residing elsewhere than in the state of his domicile. The judgment is accordingly affirmed.

MR. JUSTICE ALLEN dissents.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9991.

THOMAS REALTY COMPANY, ET AL. v. GUTHRIE.

Decided February 6, 1922.

Action to have a deed declared a mortgage. Judgment for plaintiff.

Affirmed.

1. REAL PROPERTY—*Deed a Mortgage*. A husband conveyed land to his wife with the agreement on her part that she would at any time on his request, convey or mortgage it to raise money for use in his business. Under this agreement she executed a warranty deed to secure a loan to him. Held, that on payment of the debt so secured, the property should be conveyed to her heirs, she having died in the meantime.
2. STATUTE OF FRAUDS—*Oral Conveyance of Land*. An oral agreement to convey land is void under the statute of frauds.
3. WITNESSES—*Competency—Suit by Heir*. An adverse party may not testify in an action brought by one to enforce his rights as an heir.

Error to the District Court of the City and County of Denver, Hon. Thomas J. Black, Judge.

Mr. GEORGE F. DUNKLEE, Mr. EDWARD V. DUNKLEE, for plaintiffs in error.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOL, Mr. FRANCIS G. RICKE, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

GUTHRIE had judgment below upon a bill brought by him to declare a deed to be a mortgage. The deed was executed by his mother. The defendants below, said Realty Company and Chris Irving, bring error.

The essential facts are as follows: In 1903 Irving purchased the land in question, took title in his wife, Anna C. Irving, built a house upon the property and dwelt there with her. In 1914 she executed a warranty deed to The S. J. Thomas Realty Company to secure a loan made to her husband. The deed was not then recorded. In 1920 Anna C. Irving died. Thereafter Irving paid the debt, the S. J. Thomas Realty Company executed a quit-claim to him and thereupon he recorded the two deeds.

Guthrie, who is the son of Anna C. Irving by a former marriage, claims that the warranty deed was a mortgage, and therefore the property, upon the payment of the debt, should have been re-conveyed to Mrs. Irving's heirs, who are the plaintiff Guthrie and the defendant Irving.

It is claimed for Irving that he purchased the property in question and built the house out of his own funds; that his wife contributed nothing; that he took the title in her name under an oral agreement with her that at any time he needed to raise money to use in his business she would at his request convey or mortgage the property for that purpose, and that the said warranty deed was made in fulfillment of that agreement; that, being so fulfilled, the transaction is not within the statute of frauds, that by the delivery of the warranty deed to the company Mrs. Irving parted with all title to the property, that the mortgage evidenced by said warranty deed was therefore the mortgage of Chris Irving and not of his wife, and so the release thereof, viz., the quitclaim deed, was due to him and not to her or her heirs.

The flaw in this reasoning is that it assumes without proof that Mrs. Irving by her deed parted with all title. The proof is (we assume for the purpose of argument that it is sufficient) that she agreed to mortgage or convey. She mortgaged. We must assume that the court so found

and we think the evidence justified the finding. She kept her agreement. But upon payment she must receive a release. True, the mortgage was to secure her husband's debt, but nevertheless, the equity of redemption, in the absence of proof to the contrary, remains hers. Suppose she had executed an instrument in form a mortgage; would any one claim that the release should not go to her? But a mortgage is nothing but a warranty deed with a written defeasance. Here the defeasance is oral. Is not the result the same?

If it is claimed that the agreement was to mortgage *and* convey upon request, and that therefore Mr. Irving might have demanded conveyance from his wife and so would now have a right to demand conveyance and therefore has a right to retain the property, the answer is that the fulfillment of the contract to mortgage cannot validate the agreement to convey. That agreement is still a naked oral contract, void under the statute of frauds.

It is possible that Mr. Irving's testimony would have changed the result but it was rightly excluded under the statute because plaintiff was seeking to enforce his rights as heir.

The above makes it unnecessary to notice the other points urged in support of the judgment.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 10,034.

SECHRIST v. SIMM, ET AL.

Decided February 6, 1922.

Action on alleged contract for division of real estate broker's commission. Judgment of nonsuit.

Affirmed.

1. TRIAL—*Nonsuit*. Where the evidence failed to support the case pleaded, a nonsuit was properly entered.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. CHARLES F. MILLER, for plaintiff in error.

Mr. JACOB V. SCHAEZEL, Mr. WALTER E. SCHWED, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff in an action which is not easy to classify, and the court, at the close of plaintiff's testimony, entered a nonsuit. From the judgment entered in favor of defendants, plaintiff brings the cause here for review.

The complaint alleges that plaintiff and the defendants entered into an agreement to undertake jointly the sale of certain real estate, and to divide the profits arising from the sales made under such agreement; that a sale was effected to a purchaser secured by plaintiff, and that the defendants collected a commission of \$240.00, which, it is alleged, they hold in trust in behalf of plaintiff; that they wrongfully and fraudulently withhold the same from him, to his damage in the sum of \$200.00. The complaint alleges further that the acts complained of were accom-

panied with circumstances of fraud, malice and wilful deceit. Plaintiff prays judgment for \$200.00 and for execution against the bodies of the defendants. The answer denied the agreement, and the case was tried to the court without a jury. The evidence wholly failed to support the allegations of an agreement to act jointly in the sale of real estate, but showed simply that the plaintiff asked the defendants whether or not there would be a small commission allowed him in case he furnished a buyer of real estate who bought through them and that he was told he would be entitled to some compensation. It showed further that the defendants offered the plaintiff \$60.00 which he refused. There was no evidence of fraud, or wrong doing upon the part of the defendants. The case appears to be one in which the plaintiff's cause of action, if any, was on contract. Having failed to support, by evidence, the case pleaded, a nonsuit was properly entered.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,037.

WESTESEN v. OLATHE STATE BANK.

Decided February 6, 1922.

Action on contract. Judgment of dismissal.

Reversed.

1. **CONTRACT—Construed.** Where a party executes to a bank notes for money which he desires to borrow, and the bank in consideration thereof, agrees to loan him such amount not to exceed the face of the notes, as he shall desire to use, the transaction constitutes a valid contract, and a breach thereof is actionable.

*Error to the District Court of Montrose County, Hon.
Thomas J. Black, Judge.*

Messrs. CATLIN & BLAKE, for plaintiff in error.

Mr. EDWARD M. SHERMAN, for defendant in error.

Department 2.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error sued the defendant in error for damages for a breach of a contract by which the bank agreed to loan plaintiff money for a trip to California. A general demurrer to the complaint was sustained upon the ground that the contract was unilateral, and void for want of mutuality, there being, the court held, no obligation on the part of the plaintiff to borrow any money from the bank. Plaintiff elected to stand upon his complaint, the action was dismissed, and the cause is now here on error.

The demurrer to the complaint was sustained upon the authority of *Cold Blast Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696. The facts in that case, however, are so different from those in this case that the decision furnishes no authority for the court's holding.

The contract set up in the complaint should be construed according to the familiar rule that contracts are to be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The complaint alleges that the plaintiff explained to the vice president of the banking company that he "was about to take a trip of vacation to California, and would require a credit of \$5,000.00 for use on such trip, and then and thereupon defendant, through the said vice president, caused plaintiff to execute his five promissory notes of \$1,000.00 each to defendant, and plaintiff did execute said notes to the defendant, and in consideration thereof, defendant promised and agreed that plaintiff

should have a credit of \$5,000.00 with said bank, against which plaintiff could check at his convenience; that said notes would be held by defendant, and whenever his account, by reason of checking thereon in accordance with said agreement, should be overdrawn, that said notes would be severally deposited and credited to plaintiff's account, less the usual discount thereon; and plaintiff then and there explained to defendant, and defendant knew the purpose of said trip to California, and that the obtaining of said credit was for the trip of plaintiff and his wife to California for a vacation, and that plaintiff did not, and would not have the funds for said trip and vacation, except through said credit."

It is further alleged that plaintiff, after arriving in California, drew a check on said bank, which was dishonored.

It is to be observed that the complaint alleges that the execution and delivery of the promissory notes to the bank upon the condition and for the purpose stated, was the consideration upon which the bank was to give plaintiff a credit of \$5,000.00. Unquestionably such delivery was a sufficient consideration for that contract, even if there were nothing else, because the plaintiff thereby put himself in a worse position, and because he did something he was not bound to do.

The complaint is good under another line of authorities, which hold that an agreement on the one part to sell, and upon the other part to buy all the goods, or articles, that the purchaser may *require* during a stated term, is a valid contract. This, of course, is confined to those cases in which there is good ground for believing that some goods at least will be required.

Construing the complaint as an entirety, it is clear that the bank agreed that if the plaintiff would borrow of it the money which he would require on his proposed trip, and give to the bank his notes, it would advance money through his checking account, as required by him; in short, the bank agreed to loan plaintiff the money *required*

for the trip. The moment that a check by the plaintiff called for more money than he had on deposit, the bank had the right to take one of the notes, and make it a binding obligation upon the plaintiff. It is immaterial that the exact sum he might require was not fixed. The contract was made with that fact in view. The bank being in the business of loaning money, in effect, proposed that if the plaintiff would borrow from it what he needed for the purpose stated, it would loan it to him as called for. The delivery of the notes, was an acceptance of the proposition, and completed the contract. The fact that he might shorten his trip, and so borrow less money, is not material because that, too, was a contingency which must have been recognized by the bank. That might be of some moment upon the question of the advisability of making the contract, but it does not affect its validity. Since the contract was made, the question whether or not the bank got much or little profit out of it, is beside the mark. The complaint stated a cause of action and the court erred in sustaining the demurrer.

The judgment is therefore reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

MR. JUSTICE DENISON and MR. JUSTICE WHITFORD concur.

No. 10,083.

THE INDUSTRIAL COMMISSION, ET AL. v. THE STATE INSURANCE COMPENSATION FUND, ET AL.

Decided February 6, 1922.

Proceeding under the workmen's compensation act. Award of the industrial commission set aside by the district court.

Reversed.

1. **WORKMEN'S COMPENSATION—Procedure—Waiver.** After original award by the industrial commission, on petition to reopen the case, of which employer and insurance carrier have notice, if they appear and participate in the further proceedings without objection, they will be deemed to have waived any question of the authority of the commission to enter an additional award.
2. **Loss of Vision.** Where the vision of an employe, remaining after an accident arising out of and in the course of his employment, is not such as to enable him to perform his work, although he may be able to distinguish large objects and lights and shadows, he will be entitled to compensation for total disability within the meaning of the workmen's compensation act.
3. **Blindness in One Eye, Loss of Vision of the Other.** Under the workmen's compensation act of 1915, an employe who has lost the vision of one eye, and subsequently loses the sight of the other as the result of an accident arising out of and in the course of his employment, is entitled to compensation for total permanent disability.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. ELZA C. MOWRY, for plaintiffs in error.

Mr. WALTER E. SCHWED, Mr. JACOB V. SCHAEZEL, for defendants in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THE claimant, William Grenfell, lost the sight of his left eye by accident arising out of and in the course of his employment with The Camp Bird Mining Company. The accident occurred March 16th, 1916, and the cause is governed by the Workmen's Compensation Act of 1915. In conformity therewith, and upon an agreement between the parties approved by the Commission no hearing whatever having been had, Grenfell was awarded \$832.00 for the loss only of one eye.

It appears that in 1908, while employed at another mine, Grenfell suffered an injury to the right eye, which resulted finally in a practical loss of its vision. This eye, however, was not totally useless, as claimant was able to distinguish with it large objects and lights and shadows. After the left eye was injured and after the first award had been made, by direction of the State Compensation Fund an operation was performed on the right eye, in the hope that its sight might be at least partially restored. The operation, however, was unsuccessful, and later that eye had to be removed.

The Camp Bird Company was insured in the State Compensation Fund, a department of the Industrial Commission, which paid the allowed claim for permanent partial disability in full. The last payment was made on August 7th, 1918. On September 7th next thereafter, the attorney for claimant moved to reopen the case on a claim of total disability, which motion on notice was allowed. Hearings were had on the new claim in which, without objection, all parties appeared and participated.

Findings were made and a new award entered by the Commission on March 29th, 1921, wherein it was declared that claimant was totally and permanently disabled, that such permanent and total disability arose out of and was the proximate result of the accident of March 16th, 1916, and that he was entitled to compensation at the rate of

\$34.72 per month so long as he should live and total disability continue. The Commission also found that the operation upon the right eye would neither have been advised nor required had claimant not sustained the injury to his left eye; that such operation was recommended by the State Compensation Fund in the hope that claimant might thus be enabled to continue his work and earn a livelihood; and that as result thereof he became totally and permanently disabled. The operation was performed some time subsequent to the original award, and the effect thereof was of course then unknown.

On June 14th, 1920, the Camp Bird Company filed a petition with the Industrial Commission for rehearing and review, which was denied, and it then appealed to the District Court, where the award of the Industrial Commission was set aside, on the ground that the Commission was without authority to reopen the case, and Grenfell brings the record here for review.

// The first question to determine is whether the Industrial Commission had power to reopen the case. The main contention of the employer, the Camp Bird Company, is that it had no such authority. It is to be noted, however, that the Commission was vested with jurisdiction of the subject matter when the first award was entered, and that the proceedings leading up to that award were in conformity with the provisions of the Workmen's Compensation Act. Upon the new claim the power and authority of the Commission over the subject matter is beyond dispute. It is manifest that the question goes merely to the remedy or method of procedure rather than to the right and authority of the Commission to adjust the claim.

It appears that notice of the filing of the new claim was given, and that at the hearings the State Compensation Fund and the Camp Bird Company had ample opportunity to object to the reopening of the case, but neither saw fit to do so. Instead, both appeared and actively participated in such rehearings. Testimony was taken touching facts,

circumstances and conditions, and involving questions of law never previously considered. It was, to all intents and purposes a hearing *de novo*. The objections now urged were not raised until upon application for rehearing after the entry of the second award. Under these circumstances the defendants in error cannot be heard to question the power and authority of the Commission to reopen the case, take further testimony and enter the award of which complaint is made. These being mere questions of remedy or procedure could be, and were, waived. Had proper and timely objection been made to the Commission against reopening the case, and had the objectors thereafter declined to participate in such hearings, a totally different question would have been presented, one which under the circumstances we are not now called upon to, and which we do not determine. //

The remaining question is whether claimant became totally and permanently blind by the accident at the Camp Bird mine when, as matter of fact, he was practically sightless in the right eye prior to such employment. There is nothing in our compensation statute requiring employees to be physically perfect in order to come within its provisions. Claimant, for practical purposes, was blind in one eye when he entered the service of the Camp Bird Company. This, however, did not prevent him from doing the work which he was employed to. His wages were the same as his fellow employees with perfect vision; the Camp Bird Company paid the same compensation insurance premium for him as for workmen with normal sight; no penalty whatsoever attached to him because he was practically sightless in one eye. When he lost the sight of his remaining eye in an accident arising out of and in the course of his employment we are of opinion that he became totally and permanently disabled within the meaning of our compensation act. 1/

While it is true that before the operation upon his his right eye, performed with a view of improving the vision thereof, claimant was able to distinguish large ob-

jects and lights and shadows, it nevertheless was not such vision as would at all enable him to perform the work required. In *Industrial Commission v. Johnson*, 64 Colo. 461, 172 Pac. 422, this court had before it a claimant who had lost all but one-eleventh of vision in one eye. He sought compensation for total partial disability and the Commission awarded him such compensation as the proportionate diminution bore to actual blindness. Claimant took an appeal to the District Court, where the award was reversed, and claimant given compensation as for total blindness. In reviewing and affirming this judgment this court said, at page 463:

"It clearly appears from the record that the Commission was of the opinion that the amount of compensation is to be determined by ascertaining how much an injury contributes to a disability. That is, it is assumed that if a claimant was partially disabled prior to the injury which forms the basis of his claim, and because of the injury he be found totally disabled, he is not to receive the compensation fixed for disability, because it was not all due to the injury. To illustrate: If claimant before the injury had only one-half of normal vision, and lost one-half of that, he would be entitled to one-quarter of the compensation allowed for total blindness. It is hardly necessary to say that such is not a correct construction of the law.

* * *

"Whether or not a condition found to exist amounts to total blindness, as used in this statute, is a question of law, in deciding which the spirit and purpose of the law must be considered.

"The act is highly remedial, beneficent in purpose and to be liberally construed. To say that a man who has only such vision as enables him to recognize a form before him, without being able to distinguish its outlines, is not blind within the meaning of this law, is to apply to it a strict rule of construction, and defeat its evident purpose."

See also *Employers Mutual Ins. Co. v. Industrial Commission*, 70 Colo. 228, 199 Pac. 482.

In *Branconnier's Case*, 223 Mass. 273, 111 N. E. 792, the claimant lost one of his eyes five years prior to an injury received in the course of his employment, by which the sight of his remaining eye was destroyed. The question was whether as matter of law the loss of his remaining eye in the later accident was the cause of total disability. The court said:

"The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was an impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless, it was the employee's capacity. It enabled him to earn the wages which he received. * * * The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury."

We are aware that the principle laid down in the opinion above cited, and here approved, is not followed in all jurisdictions, and that there are cases holding to the contrary. In view, however, of the liberal construction of the Workmen's Compensation Act adopted by this court, and carefully bearing in mind the evident purpose and intent of the Act, which is held to be highly remedial and beneficent in its nature, we are constrained to uphold the award of the Industrial Commission here in question.

The judgment of the District Court is therefore reversed and the cause remanded with directions to enter an order affirming the award of March 29th, 1920, which award might well have been made originally, had all of the facts then in existence been before the Commission for consideration and action, instead of the agreement of the parties.

Judgment reversed and cause remanded with directions.

No. 10,162.

OWNBEY v. SILVERSTEIN.

Decided February 6, 1922.

Action for attorney fees. Judgment for plaintiff.

*Affirmed.**On Application for Supersedeas.*

1. **APPEAL AND ERROR—Sufficient Evidence.** When a case is reversed and retried upon the old record alone, the only error that can be considered upon another writ of error from this court is the sufficiency of the evidence.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. B. F. REED, Mr. ROBERT W. STEELE, JR., for plaintiff in error.

Mr. G. DEXTER BLOUNT, Mr. HENRY E. LUTZ, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS case was here, No. 9931, after judgment below for defendant for \$7,000.00 and was reversed. 69 Colo. 325, 194 Pac. 607. The ground of reversal was that the instructions of the court gave to the jury an erroneous basis of the measure of damages.

The case having again come before the district court and the same judge, the record in the former case in this court was, by stipulation, submitted to the court below without further evidence and a judgment was rendered for \$6,834.22 for the defendant. Ownbey, the plaintiff, now asks for a *supersedeas*.

It is obvious that in such a case the only possible as-

signment of error which we could consider here must be based upon the sufficiency of the evidence. We cannot say that the evidence is insufficient to justify the judgment; as a matter of fact, upon the essential points in the case there is not much dispute.

Supersedeas denied and judgment affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE WHITFORD concur.

No. 10,187.

O'DONNELL v. THE PEOPLE.

Decided February 6, 1922.

Plaintiff in error was convicted of the crime of robbery.

Affirmed.

On Application for Supersedeas.

1. **CRIMINAL LAW—Confessions.** Where a statement of a defendant in a criminal case, made before trial, contains an admission that it was freely and voluntarily made, without threats or promises, which admission is supported by testimony, the statement is admissible in evidence.

In passing upon the question of admissibility, considerable discretion is vested in the trial court.

Error to the District Court of the City and County of Denver, Hon. H. E. Munson, Judge.

Mr. MORTON M. DAVID, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, Mr. SAMUEL CHUTKOW, assistant, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error, (hereinafter referred to as defendant) was convicted on a charge of robbery. To review that judgment he brings error and asks the issuance of a *supersedeas*. Defendant's reply brief was filed herein November 8, 1921. Action has been thus delayed by reason of the illness of the Justice to whom the cause was first assigned.

The only assignment of error argued in the briefs is the third, *i. e.*, that the trial court improperly admitted evidence of an involuntary confession. This confession was a transcript of short-hand notes of questions and answers wherein defendant admitted his guilt and gave in detail his version of the transaction. It was overwhelmingly proven and undisputed. It disclosed that defendant had been duly cautioned and that his statements were voluntary. When offered in evidence the jury was excused and witnesses examined by the court as to the character of the confession. Four of these corroborated the confession in this particular. They testified that it was freely given without coercion or inducement. The court so found and gave to the jury two instructions on the subject exceedingly favorable to defendant.

Where such a statement contains an admission that it was freely and voluntarily made, without threats or promises, and that admission is supported by the testimony of persons present at the time, the statement is admissible in evidence. In passing upon the question a considerable discretion is vested in the trial court. 16 C. J. 735. That discretion was not abused in the instant case.

Not only is the record exceptionally free from error and the verdict amply supported by the evidence, but no other was possible thereunder. The *supersedeas* is denied and the judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 10,239.

THE INDUSTRIAL COMMISSION, ET AL., v. THE GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, ET AL.

Decided February 6, 1922.

Proceeding under the Workmen's Compensation Act. Judgment of the district court amending the award of the industrial commission.

Reversed.

1. **WORKMEN'S COMPENSATION—Commission Findings of Fact Conclusive.** The district court in an action to review an award of the industrial commission has no right to set aside or amend a finding of fact of the commission, and then order the award to be amended accordingly.
2. **Disability of Claimant—Determination.** Where an employe sustained a loss of his right thumb, index and middle fingers and a partial loss of the use of the hand, under the provisions of the act of 1919, the industrial commission had the power to fix the disability on the basis of a partial loss of the use of the hand, rather than on the loss of the fingers.
3. **Double Compensation.** The commission may not allow for loss of fingers and add compensation for the loss or partial loss of use of the hand.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. H. I. GARBUTT, for plaintiffs in error.

Mr. FRANK L. GRANT, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

IN a proceeding for compensation under the Workmen's Compensation Act, the Industrial Commission made an award in favor of the claimant, Ralph McConnell. The employer and the insurer brought an action in the district court to set aside the findings and award. Upon a hearing, the district court remanded the cause to the Industrial Commission with directions to amend the award. The defendants, the Commission and the claimant, bring the cause here for review, and cross-error is assigned by plaintiffs, the employer and the insurer.

The plaintiffs in error complain of the district court's directions to amend the award. The Commission made a finding as to the average weekly wage of the claimant. The district court set aside the finding on the ground that it had no support in the evidence, and substituted a finding of its own, and ordered the award amended accordingly. This was error. The court had no right to set aside or to amend a finding of fact, and then order the award to be amended accordingly. The only grounds upon which a court may set aside an order or award of the Commission are set forth in section 103, chapter 210, Session Laws of 1919, namely, (a) That the Commission acted without or in excess of its powers; (b) That the finding, order or award was procured by fraud; and (c) That the findings of fact by the Commission do not support the order or award.

The assignments of cross-error raise the question whether the Commission correctly designated the loss for which accident benefits are allowed. The claimant's injury resulted from getting his hand into a sausage grinder. A physician and surgeon testified that the claimant suffered the loss of thumb, index finger and middle finger, each being taken off at the proximal joint; that the hand has been impaired 70%. The witness was asked:

"How do you determine the basis of disability, Doctor, as 70%?"

His answer was:

"Loss of action of the hand from the wrist down. He has lost the thumb, both the index and middle fingers and he has lost all the gripping power of his hand."

The Commission found, and made the award accordingly, "that the claimant has sustained a permanent disability equal to a 70% loss of the use of his right hand measured from the wrist."

The contention of the defendant in error is claimant was entitled only to compensation for the loss of the thumb and fingers; in other words, that the Commission was bound to act only under the first part of Section 73 of the Act of 1919, which, so far as material here, reads as follows:

"In cases included in the following schedule the disability in each case shall be deemed to continue for the period specified and the compensation to be paid for such loss shall be specified herein, to-wit:

The loss of a hand.....104 weeks
The loss of a thumb at the proximal joint.... 35 weeks
Loss of an index finger at the proximal joint.. 18 weeks
Loss of a middle finger at the proximal joint.. 13 weeks."

The Commission proceeded under subdivision (g) of Section 73, which, so far as material in this connection, reads as follows:

"Where an injury causes the loss of use or partial loss of use of any member or members specified in the foregoing schedule, the Commission may determine the disability suffered and the amount of compensation to be awarded, by awarding compensation which shall bear such relation to the amount stated in the above schedule for the loss of a member or members as the disabilities bear to the loss produced by the injuries named in the schedule."

This provision authorizes the finding and award of the Commission in respect to the matter now under consideration. The schedule, heretofore quoted, includes "the loss of a hand." Under subdivision (g) the Commission could, as it did, award compensation for the "partial loss of use" of the hand.

In *North Beck Mining Co. v. Industrial Commission*, (Utah), 200 Pac. 111, the claimant had suffered the total loss of some of his fingers and the partial loss of others, and it was held that the Commission was not obliged to compensate for the loss by adding the scheduled benefits for the loss of each finger, or proceed under the schedules for specific losses, but could act under that clause of the statute which allowed compensation for the loss of a "bodily function not otherwise provided for," and thereby make an award, as it did in that case, for the partial loss of the use of the hand. The conclusion we reach is also supported by *Rockwell v. Lewis*, 168 App. Div. 674, 154 N. Y. Supp. 893, holding that "where the loss or injury to fingers and thumb result in the permanent loss of the use of the hand, the commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation," instead of confining the compensation to the schedule rate for fingers.

In the instant case, the Commission correctly treated the partial loss of the use of the hand, as being the compensable loss sustained. It committed no error in not designating the injury as a loss of the thumb and fingers and awarding the scheduled benefits for the loss of such members.

It is further argued that the Commission could not award compensation for the loss of thumb and fingers under the schedule and then add thereto the compensation allowed for the loss or partial loss of the use of the hand. With this contention we agree, but not with the further assertion, or the assumption, that there was an award of double compensation in this case. It is admitted by the pleadings, that the insurer, prior to the hearing and

the award, paid to claimant the amount of compensation, where the average weekly wage is \$10, which the statute provides for the loss of thumb and two fingers. The Commission's award does not purport, however, to be one of an additional compensation. The award is the full or entire compensation, and whatever the insurer has already paid may and should be credited upon the award.

The judgment is reversed, and the cause remanded with directions to affirm the findings and award of the Industrial Commission.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,247.

KOCH v. THE PEOPLE.

Decided February 6, 1922.

Plaintiff in error was convicted of malicious mischief.

Reversed.

On Application for Supersedeas.

1. **MALICIOUS MISCHIEF—Intent.** The malicious mischief statute is criminal and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime, independent of any evil purpose or intention.

The statute does not apply to the pulling down of a fence by defendant, erected across land claimed by him and in his possession, without his consent.

Error to the County Court of Fremont County, Hon. Kent L. Eldred, Judge.

Mr. ORION W. LOCKE, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. SAMUEL CHUTKOW, assistant, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error (hereinafter referred to as defendant) was convicted and sentenced on a charge of malicious mischief under section 1874, R. S. 1908. The act, charged and admitted, was the cutting and pulling down of a certain fence belonging to, and erected by, the prosecuting witness Lemons. To review that judgment defendant brings error and asks the issuance of a supersedeas.

Defendant was in charge of the property of his mother and acting under the direction of his parents. The land of Lemons joined that of Mrs. Koch. The line between them had been for years in dispute and unsettled. Mrs. Koch and her predecessors in interest had, however, during all this time retained possession of the strip in controversy and had cultivated a portion of it. The old fence, standing on the line thus long acquiesced in, had fallen into bad condition. Lemons rebuilt this fence on the line claimed by him, and defendant cut it. Defendant's motion for a directed verdict was overruled. The question of the existence of malice was submitted to the jury. There was no evidence of malice save what might be inferred from the foregoing. This was insufficient to support the charge.

"The mere intentional doing of an act prohibited by statute, or omitting the performance of a statutory duty, does not alone constitute malicious mischief, though it may damage the property of another. The malicious mischief statute is criminal, and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime independent of any evil purpose or intention." *Mayn v. People*, 56 Colo. 170, 173, 136 Pac. 1016, 1017.

Under a state of facts almost identical and considering the element of malice it was said:

"The statute in regard to malicious mischief, does not apply to cases of this kind, where opposition is made by a claimant of premises of which he is in actual possession, to the erection of a fence across the same without his consent." *Sattler v. People*, 59 Ill. 68, 70.

The motion for a directed verdict should have been sustained. The judgment is reversed with directions to discharge the defendant.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT, MR. JUSTICE ALLEN and MR. JUSTICE BAILEY not participating.

No. 10,250.

VAN DIEST *v.* THE PEOPLE.

Decided February 6, 1922.

Plaintiff in error was convicted upon a charge of robbery.

Affirmed.

On Application for Supersedeas.

1. *CRIMINAL LAW—Verdict—Credibility of Witnesses.* The verdict in a criminal case will not be disturbed, on the ground that it is not sustained by the evidence, where that question depends wholly upon the veracity of the witnesses, of which the jury is the sole judge.
2. *Verdict—Sufficiency.* A verdict in a criminal case which finds the defendant guilty of "robbery with a deadly weapon, to-wit,

a gun," is not insufficient because it does not include the words, "as charged in the information," or does not more definitely specify the crime as defined by statute.

Error to the District Court of Arapahoe County, Hon. Samuel W. Johnson, Judge.

Mr. C. A. IRWIN, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES H. SHERRICK, assistant, for the people.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

VAN DIEST was convicted upon a charge of robbery with a deadly weapon. He brings error and claims that the conviction should be reversed: First, because the verdict is not sustained by the evidence; and second, because the verdict is insufficient to support the judgment.

As to the first point, we have examined the evidence with great care. We cannot disturb the verdict. It depends wholly upon the veracity of the witnesses of which the jury is the sole judge.

As to the second point, the verdict finds the defendant guilty of "robbery with a deadly weapon, to wit, a gun." It does not say "as charged in the information." It is claimed that it ought to have done so or else to have found that the defendant "was armed with a dangerous weapon, with intent if resisted to kill or to maim," according to the statute, S. L. 1921, ch. 92, and according to the tenor of the information.

We cannot see that the verdict is insufficient. The most that could be said is that the jury failed to find the intent to kill or maim if resisted; but nevertheless the verdict is still a good conviction of robbery and the sentence is within the punishment prescribed for that offence.

The *supersedeas* is denied and judgment affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,261.

In the Matter of the Estate of MADRIL.

DE QUINTANA, ET AL. v. MADRIL.

Decided February 6, 1922.

Petition for orphan's allowance against the estate of a decedent. Petition denied.

Reversed.

1. **PROBATE LAW—Orphan's Allowance—Statute of Foreign State not Controlling.** Where a resident of New Mexico died leaving minor children in Colorado, where he owned a tract of land, the children were entitled to orphans' allowances under the laws of Colorado, which are controlling on the question, rather than the statutes of the foreign state.
2. **Orphan's Allowance—Priority of Claim.** A claim for an orphan's allowance is not a claim under the law of descents and distribution; the allowance is not an interest in the estate; it is a preferred claim and first charge upon decedent's property in the state, and is given priority over claims of general creditors.

Error to the District Court of Alamosa County, Hon. Jesse C. Wiley, Judge.

Mr. JAMES D. PILCHER, Mr. CHARLES H. WOODARD, for plaintiffs in error.

Mr. ALBERT L. MOSES, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS cause is before us upon writ of error which has been sued out to obtain a review of a judgment disallowing certain petitions or claims for an orphan's allowance out of and against the estate of a decedent.

Justo R. Madril, now deceased, and Adeline Madril were husband and wife, respectively, and resided in the state

of Colorado, in the year 1914. During that year the wife obtained a decree of divorce, in the county court of Alamosa County, Colorado. The custody of two minor children, being the daughters of these parties, was awarded to her. The divorced wife and the children continued to reside, and still reside, in Alamosa County. The divorced husband, Justo R. Madril, above named, removed to the state of Mexico. He died, domiciled in that state, in 1919. At the time of his death he was the owner of certain real estate, of the value of about \$1,000, situated in Alamosa County, Colorado. The county court of that county appointed his former wife as the administratrix of his estate.

The two children of Justo R. Madril, deceased, still being minors, filed, in the county court of Alamosa county, Colorado, their separate petitions for an orphan's allowance, proceeding under and relying upon section 14 of chapter 173, session laws of 1915, which amended section 7223 R. S. 1908. By that section, it is provided that "if any decedent" leaves no widow, but does leave "an orphan minor child, or children, such child or children shall be entitled to the same rights of allowance as a widow."

The petitions each allege that the deceased left no property, such as beds, bedding, wearing apparel, cow or calf, or household furniture, which, under the statute last above cited, may be taken as and for a widow's or orphan's allowance. The petitioners therefore pray that their orphan's allowance be allowed in money out of the estate. In this connection, they proceeded under chapter 69, session laws of 1917, which amends and supersedes section 7228 R. S. 1908, and provides that where the "personalty is not sufficient to pay" the allowance and "the value of the real estate is not more than sufficient to pay the balance of such allowance," the real estate may be awarded to the widow or orphan.

The claim of the petitioners for an orphan's allowance is and was opposed by a creditor of the decedent. The creditor's claim was allowed, but cannot be satisfied if the

real estate is awarded in satisfaction of the orphans' allowances. Hence arises the controversy between the orphans and the creditor.

The county court denied the petitions for orphan's allowance. A like result obtained on appeal to the district court, and claimants bring the cause here for review, now applying for a *supersedeas*.

The right of the plaintiffs in error to receive each an orphan's allowance in accordance with the statutes of this state, is not disputed or questioned otherwise than by objections based upon, or by a relation to, the fact that the decedent died resident and domiciled in the state of New Mexico.

It is conceded that the plaintiffs in error are not entitled to an orphan's allowance if the law of the state of New Mexico is to govern in the instant case, for the reason that such law provides for no allowance where the children are, as they are in this case, over the age of fifteen years. The question to be determined is, may they receive the allowance under the statute of this state, or, in other words, does the law of this state govern in the instant case?

The claimants are residents of this state. All of the real estate or property sought to be subjected to the allowance is situated within this state. Our statute comprehends this case, as well as others, this case being one where the decedent was at the time of his death a non-resident of this state. The statute uses the term "any decedent." Residence within this state is required of the widow or orphans who choose to avail themselves of the benefits of the statute, but it is not provided expressly or by implication that the decedent too must have been a resident of this state. Our statute, taken by itself, gives the plaintiffs in error their orphan's allowance as claimed by them. This construction does not render the statute amenable to any objection. In a note under the case of *Jones v. Layne*, 144 N. C. 600, 57 S. E. 373, as reported in 11 L. R. A. (N. S.) 361, it is said:

"A state within whose borders personal assets of a decedent are found has the power to grant an * * * allowance to the widow out of those assets, irrespective of the domicile of her husband at the time of his death."

Widows' allowances and orphans' allowances stand on the same footing.

The defendant in error, the creditor above mentioned, insists that the statute of New Mexico, and not that of Colorado, must control, and in support of his contention quotes from 5 R. C. L. 929. The following is the pertinent sentence, and expresses the rule relied on:

"In the administration and settlement of decedents' estates personal property is distributed by the law of the domicile of the decedent at the time of his death."

This rule is not applicable in the instant case for the reason that the property is not sought to be "distributed." A claim for an orphan's allowance is not a claim under the law of descents and distributions. The allowance is not an interest in the estate, but is a preferred claim against the estate. *Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 67. In *Deeble v. Alerton*, 58 Colo. 166, 143 Pac. 1096, Ann. Cas. 1916C, 863, this court in speaking of the widow's allowance, which occupies the same position as an orphan's allowance, said:

"It is a first charge upon estates, and so made to provide for the comfort and sustenance of the widow and children, pending administration and before distribution. It therefore cannot be a part of that which is to be distributed."

In 5 R. C. L. 929, *supra*, it is further said:

"But the law of the domicile of the decedent must yield to that of the actual *situs* of the property, where rights of creditors resident at the *situs* are in question."

For the stronger reason the law of the decedent's domicile must yield where rights of orphans with respect to their statutory allowances are concerned, where such orphans are resident at the *situs* of the property. The allowances are given priority over claims of general cred-

itors, and with good reason, for, as stated by us in *Deeble v. Alerton, supra*, allowances to widows and orphans are provided for, not only as a protection to them against want but also as a protection for the state as well. The law of this state governs as much in this case as if the rights of a creditor, resident here, were involved in the principal question.

The court erred in disallowing the claims in question. It would unduly prolong this opinion to review the authorities in point, but as supporting the conclusion here reached we cite: *Jones v. Layne, supra*; *Stromberg v. Stromberg*, 119 Minn. 325, 138 N. W. 428; 24 C. J. 232, notes 12, 13.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,238..

THE WESTERN ACCEPTANCE COMPANY, ET AL. v. THE SIMMONS COMPANY, ET AL.

Decided January 13, 1922.

Petition of interveners for dissolution of receivership.
Petition granted.

Affirmed.

On Application for Supersedeas.

1. PLEADING—*Causes of Action—Separation.* Record reviewed and held, that a motion to separately state alleged different causes

of action in a petition in intervention for the dissolution of a receivership, was properly overruled.

2. *RECEIVERS—Appointment—Discretionary.* Whether a receiver will or will not be appointed, is a question which ordinarily rests in the sound discretion of the court, and the exercise of that discretion will not be interfered with save in a clear case of abuse.
3. *Appointment—Waiver by Defendant—Interveners.* While a defendant may waive certain requirements for the appointment of a receiver, such waiver does not bind an intervener in the action.
4. *Collusion in Appointment—Discharge.* Where subsequent to the appointment of a receiver, it was made to appear to the court that the receivership was procured by collusion between the debtor, which was solvent, and one of its creditors, for the purpose of enabling the debtor to continue its business under the same management, without being disturbed by its other creditors, the receivership was properly dissolved.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Messrs. LEWIS & GRANT, Mr. ALBERT G. CRAIG, Mr. W. W. WALLACE, Mr. HENRY E. MAY, for plaintiffs in error.

Mr. GEORGE E. TRALLES, Messrs. HINDRY, FRIEDMAN & BREWSTER, Mr. ROBERT COLLIER, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

THIS action was begun below by plaintiff in error, The Western Acceptance Company, (hereinafter referred to as plaintiff) against plaintiff in error, The Ward Auction Company, (hereinafter referred to as defendant), and the defendants in error, (hereinafter referred to as interveners) intervened.

The complaint alleges that defendant is indebted in the sum of \$20,000, of which sum \$5250 is owing plaintiff, and \$750 thereof, plus \$212.63 interest, is due and unpaid; that defendant cannot meet his obligations "and is in

imminent danger of insolvency;" that if a receiver is not appointed a multiplicity of suits will result and large amounts of unnecessary costs be incurred; which results can only be avoided by the intervention of equity. The prayer is for an ascertainment of the rights of creditors, the continuance of the business, the court's administration of defendant's property and funds, the appointment of a receiver to prevent the threatened suits, an injunction to restrain defendant from exercising further control over its property and business and other creditors from prosecuting their claims, and for costs.

The complaint was filed on September 29, 1921. Defendant answered the same day admitting everything, waiving everything, and consenting to the receivership. This answer was verified by John H. Martin, president of defendant company. On the same day said Martin was appointed receiver with all the power and authority asked for in the complaint, and on the following day he took his oath and entered upon the discharge of his duties. On October 27, 1921, by leave of court, the petition in intervention was filed. This petition sets forth that the interveners are creditors of the defendant company in the total sum of approximately \$10,000; that about eighteen months prior to the commencement of this action said Martin purchased substantially the whole capital stock of the defendant company, then, and long prior thereto, a prosperous and successful concern; that he has since remained, and now is, in full control of the business; that he has so mismanaged the same that it has become practically insolvent; that the appointment of the receiver was the result of collusion between plaintiff and defendant and in fraud of, and in violation of the rights of, other creditors whose claims are long past due and unpaid, and to prevent the collection of said claims. The petition likewise alleges want of facts in the complaint to constitute a cause of action, want of facts to support the receivership, and want of facts to support this injunction. The prayer is for a dissolution of the receivership, or, if that can-

not be had, for the discharge of the said Martin and the appointment of some other person, for general relief, and for costs.

A motion to separately state causes of action set out in the petition in intervention, and a demurrer to the petition for want of facts "in so far as the same relates to a pretended cause of action for the vacation of the receivership proceedings," were overruled. Thereafter, and on the 25th day of November, 1921, on interveners' petition, the receiver was discharged and the receivership proceedings dissolved.

A few days prior to the discharge of the receiver, the filing of an inventory and a report by the receiver of his action thus far, developed that defendant had assets exceeding its liabilities and that during the time it had been in the receiver's hands it had paid approximately \$1200 in miscellaneous expenses and made a profit of approximately \$1000.

On the day of the discharge of the receiver plaintiff and defendant filed a joint reply to the petition in intervention. This reply disputes an item of some \$15.00 in the claim of one of the interveners, asserts that the change in the prosperous condition of defendant's business did not occur until May 30, 1921, alleges that the said John H. Martin purchased his stock February 2, 1918, alleges that the condition of the company as set out in the complaint is due to general business conditions instead of mismanagement. The remainder of this reply consists of admissions, and minor denials of no moment.

From the judgment discharging the receiver and dissolving the receivership plaintiff and defendant join in suing out this writ. Three alleged errors are assigned: 1. The order of the trial court overruling the motion to separately state causes of action in the petition in intervention; 2. The order overruling the demurrer to said petition as relating to the receivership; 3. The final order discharging the receiver and vacating the proceedings.

BURKE, J., after stating the facts as above.

1. Two causes of action were not joined in the petition in intervention. The cause alleged was a cause for the vacation of the receivership proceedings. It could not be set out without showing, as an inseparable part thereof, the exceeding impropriety of the appointment of the particular receiver designated by the court. The prayer, it is true, asked a discharge of this receiver should the proceedings be not dissolved. Such a commingling was unavoidable. The motion to separately state was properly overruled.

2. If the final judgment of the court was correct the demurrer should have been overruled, hence every question properly arising under the second assignment may be considered under the third.

3. It is urged that the insolvency which will justify the appointment of a receiver for a corporation is not equivalent to bankruptcy, but may be defined as "an inability to meet obligations as they mature in the due course of business," and that such a condition was here shown. We assume, without deciding, the correctness of this proposition.

It is further urged that the objection that plaintiff was a simple contract creditor who had obtained no judgment on which execution had been issued and returned unsatisfied could be, and was, waived by defendant. The defendant could bind himself but not the interveners by that waiver.

Whether a receiver will, or will not, be appointed is a question which ordinarily rests in the sound discretion of the court and the exercise of that discretion will not be interfered with save in a clear case of abuse. 34 Cyc. 19.

Nominally the action here sought to be reviewed is the judgment dissolving a receivership, but the discharge was upon the ground that the original showing was insufficient; that other remedies had not been exhausted; that the rights of other creditors had been invaded; in short that the appointment was unjustified and erroneous. The

trial court, having inadvertently abused its discretion in the first instance, made haste to undo the wrong. The matter is therefore to be considered here as though the trial court had declined to entertain the petition and that action were now under review on an allegation of abuse of discretion.

To uphold this position our attention is called to *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, as a case "exactly parallel to the instant one." The case is so dissimilar as to be no aid. Practically all of the authorities cited in support of the contentions of plaintiffs in error are authorities which uphold the action of trial courts in the appointment of receivers. That they justify the exercise of a chancellor's discretion does not imply that they are sufficient for its overthrow. The distinction is too obvious to require comment.

We do not think such a case as the one before us can be found in the books. Disregarding trivial and immaterial details, and stripping it of its flimsy drapery, it stands forth thus: John H. Martin, (The Ward Auction Company), having assets considerably in excess of his liabilities and in possession of a going business capable of maintaining him and returning a profit of \$1000 per month, is threatened with suits by numerous creditors. He arranges with the principal one of them (but a small fraction of whose demand is due and no part of which has been reduced to judgment, who has no lien upon his debtor's property and no claim to the possession thereof, who makes no pretension that the debtor's possession is wrongful or that the property, or any part thereof, constitutes a special fund to which he is entitled to resort for satisfaction) to bring a simple action in equity and have himself appointed receiver for himself at a comfortable salary, with authority to continue the business as theretofore and thus enable him to nestle down under the protecting wing of the court and let his other creditors whistle. Further comment is superfluous. The trial court correctly held the original appointment erroneous.

It properly exercised its discretion in promptly correcting that error.

The *supersedeas* is denied and the judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 10,236.

STONG, State Treasurer v. THE INDUSTRIAL COMMISSION.

Decided February 20, 1922.

Action in *mandamus* to compel the state treasurer to invest money belonging to the state compensation insurance fund in United States bonds. Writ granted.

Affirmed.

1. OFFICERS—*Mandamus*. Mandamus lies to compel a bonded public officer to do his duty.
2. STATUTES—*Construction*. A statute which gives the power to direct, also imposes the duty on the one directed to obey.
3. STATE COMPENSATION INSURANCE FUND—*Control—Investment*. The industrial commission has full control of the fund, and nothing is required of the state treasurer but to obey the instructions of the commission as to the investment thereof, under the statute.
4. CONSTITUTIONAL LAW—*Public Funds—State Treasurer*. Constitutional provisions giving the state treasurer control over state money, have no application to a special fund, not a part of the general revenues of the state, and of which the treasurer is custodian only, e. g., the state compensation insurance fund.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES ROACH, deputy, Mr. B. M. McMULLEN, assistant, Mr. A. M. STEVENSON, Mr. GEORGE A. CARLSON, for plaintiff in error.

Mr. H. E. CURRAN, Mr. W. F. MOWRY, Mr. CHARLES H. SMALL, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE district court upon the relation of the Industrial Commission, granted a peremptory *mandamus*, requiring Stong, state treasurer, to invest \$200,000 of the state compensation insurance fund in United States bonds. He brings error.

The statute, S. L. 1919, chapter 210, contains the following:

"Section 123. The Commission is hereby vested with full power, authority and jurisdiction over the State Compensation Insurance Fund and may do and perform any and all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction over said Fund in the administration thereof under the provisions of this act, as fully and completely as the governing body of a private insurance company might or could do, subject, however, to all the provisions of this act."

"Section 140. The State Treasurer shall be the custodian of the State Compensation Insurance Fund and all disbursements therefrom shall be paid by him upon warrants of the State Auditor upon vouchers issued by the Commission and the State Auditor is hereby authorized and directed to draw warrants upon the State Compensation Insurance Fund for payment thereof, upon order of the Commission."

"Section 141. The Commission shall in writing authorize and direct the State Treasurer to invest any portion of the State Compensation Insurance Fund which in

the judgment of the Commission is not needed for immediate use. Said fund, including its surplus and reserves or any portion thereof, may be invested in any warrants or bonds of the State of Colorado or of the United States of America at market price, as may be determined by the Commission. * * * Upon the direction of the Commission, with the approval of the State Auditing Board, the State Treasurer shall sell or dispose of such portion of the investments of said Fund at market price, as may be directed."

The Commission directed the treasurer to invest in United States bonds but he disobeyed and invested in state warrants.

In this court the plaintiff in error makes four points:

1. He says that the petition neither alleges nor shows that the relator had no remedy at law.

The brief suggests an action for damages could be brought on the bond of the treasurer as custodian of the fund, and so *mandamus* will not lie. The conclusion necessitates the premise that no public officer who has given a bond can be compelled to do his duty. Such is not the law. *Bell v. Thomas*, 49 Colo. 76, 111 Pac. 76, 31 L. R. A. (N. S.) 664.

2. Plaintiff in error says "It affirmatively appears from the petition that the plaintiff in error is not directed by law to perform the act complained of."

It is immaterial what the petition shows the law to be. We look to the statute for that. In support of this second proposition, however, it is urged that section 141 merely gives the Commission power to direct and does not require the treasurer to obey. We think such an argument requires no answer.

3. It is said that the act required involves the exercise of skill, judgment and discretion and is not a ministerial act. We cannot agree to this proposition.

The language is plain and incapable of two constructions. Full control of the fund is given to the Commission; the custodian is authorized to do nothing with it

except upon their order, and his investment of it is restricted to "warrants or bonds of the state of Colorado, or of the United States of America at market price, as may be determined by the Commission." The custodian is as much under the control of the words "as may be determined by the Commission" as by what precedes them. Nothing is required of the treasurer by the statute but to obey the commission and invest as directed at the market price. It is enough here to cite *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181, and *People v. Higgins*, 69 Colo. 79, 84, 85, 168 Pac. 740.

4. It is claimed that section 141, if construed as above, violates article 10, section 12 and article 5, section 33 of the Constitution.

The argument is that the power of the treasurer over the state money is constitutional and so cannot be taken from him by the General Assembly. This, without decision, may be conceded; and we also pass over the power given to the legislature by said section 12, to regulate "the safe keeping and management of the public funds in the hands of the treasurer"; yet the constitution is not violated, because the fund in question is not the general property of the state and its custody is no part of the treasurer's constitutional duty but is conferred on him by statute only. The fund is not "creditable to the general revenue of the state" and is "designated for purposes other than such general revenue," and so is not in the treasury of the state, S. L. 1913, pp. 580, § 1 and 582, § 4. The treasurer, *eo nomine*, is made custodian of it, but gives a special bond, and anybody else, e. g. the Industrial Commission itself, might have been and may hereafter be made such custodian when the legislature sees fit.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 9912.

THE MCGHEE INVESTMENT CO. v. KIRSHER.

Decided January 9, 1922. Rehearing denied March 6, 1922.

Action for damages and the cancellation of a promissory note. Judgment for defendant on his counterclaim.

Affirmed.

1. **BILLS AND NOTES—Promissory Note—Accommodation Party.** One who executes a note for the purpose of obtaining money for another, and who receives no part of the fund for his personal use, the entire amount going to the accommodated party, is an "accommodation party" as defined by section 4492, R. S. 1908.
2. **APPEAL AND ERROR—Instructed Verdict.** Where both parties to litigation move for a directed verdict, neither can complain because the case was not submitted to the jury on the facts.
3. **Judgment Non Obstante.** The contention that the trial court erred in not granting a motion for judgment *non obstante veredicto*, considered and overruled.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Messrs. PERSHING, NYE, FRY & TALLMADGE, Mr. ROBERT G. BOSWORTH, for plaintiff in error.

Messrs. DANA, BLOUNT & SILVERSTEIN, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiff below, The McGhee Investment Company, brought an action against the defendant, W. J. Kirsher, for damages for failure to return certain stock delivered as collateral security for a note, and to cancel the note, giving defendant credit for the principal and interest thereof. With reference to the transactions which gave

rise to the plaintiff's alleged cause of action, the defendant filed an answer and counterclaim. The defendant obtained judgment on his counterclaim. The plaintiff brings the cause here for review.

Error is assigned to the court's denying plaintiff's motion for a directed verdict in favor of plaintiff on its complaint, but the entire argument goes to the court's rulings with reference to the defendant's counterclaim. Error is assigned, and the assignment is argued, that the court erred in sustaining defendant's motion for a directed verdict on the counterclaim.

The first contention is that "defendant was not an accommodation party." The question is material because the defendant in his counterclaim alleges, in substance, that for the accommodation of plaintiff he executed a note to The Pioneer State Bank in the sum of \$5,000, and seeks to be indemnified by plaintiff in the amount he was compelled to pay thereon.

An "accommodation party" is defined in the Negotiable Instruments Act, particularly by section 4492 R. S. 1908, as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. * * *"

The contention, above mentioned, when argued, relates only to the question whether defendant, in signing the note for \$5,000 to the bank, did so "without receiving value therefor."

The term "value" as used in the Act, relates to value for the negotiable instrument and not to the loan of the name by way of accommodation. 8 C. J. 253, sec. 398.

Plaintiff contends that defendant received value for the note because out of the \$5,000 received from the bank he retained, for a short time, the sum of \$500, intermingled with his own funds. This fact when taken in connection with attendant circumstances does not sustain the plaintiff's contention. The plaintiff gave to defendant certifi-

cates representing 35,000 shares of stock in a certain concern, for the purpose of depositing them with the bank, and obtaining a loan thereon in the name of defendant but to be used by plaintiff. Defendant obtained a loan of \$5,000. Plaintiff then asked him to "turn over \$4,500 to him (plaintiff) and leave \$500 in the bank." Plaintiff could not obtain any loan from the bank on the stock, and that was the reason why defendant was induced to do so. The \$500 was left in the bank, not for the benefit of defendant, but for the purpose of making it appear to the bank that plaintiff was not concerned in the transaction. The \$500 was afterwards paid out on behalf of the plaintiff for various purposes and at its direction. Defendant used none of that money for his own purposes, and it was not contemplated by the parties that he should do so. It was treated by both parties as plaintiff's money from the very moment it was received from the bank, or credit therefor given by the bank. The trial court correctly held that defendant was an accommodation maker.

The next contention is stated as follows: "In any event there were certain clear cut questions of fact for the determination of the jury."

The conflict in the evidence was upon immaterial matters, but if the situation were otherwise, which may be assumed, there was no error of which plaintiff can complain. Both parties moved for a directed verdict, and neither can now insist, that the case should have gone to the jury. *O'Brien v. Galley-Stockton Shoe Co.*, 65 Colo. 70, 173 Pac. 544; *Saxton v. Perry*, 47 Colo. 263, 268, 107 Pac. 281.

The last contention of plaintiff in error is that the court erred in overruling plaintiff's motion for judgment notwithstanding the verdict. We find no merit in the contention.

The counterclaim above considered is referred to in the record and in the argument as the "fourth counterclaim." The defendant interposed three other counterclaims. The court granted plaintiff's motion for non-suit as to the first,

and sustained motions of plaintiff for directed verdicts as to the second and third, respectively. The rulings as to each of the three causes of action, or counterclaims, are assigned as cross-error by defendant.

These three additional counterclaims involve transactions other than the one treated in the "fourth counterclaim." We have examined the pleadings and the evidence as abstracted, and find no reversible error in the record.

The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 9988.

HILL v. RHULE, ET AL.

Decided January 9, 1922. Rehearing denied March 6, 1922.

Action for conversion of horses. Judgment for defendants.

Reversed.

1. **APPEAL AND ERROR—Record.** The record and bill of exceptions are sufficient to authorize a review where the record shows a final judgment, although the clerk's certificate reads, "all court orders."
2. **LIENS—Agisters.** It is essential to the attachment of the lien, that the agister should have possession and control of the animals.
3. **Agister's—Chattel Mortgage.** The lien of a prior chattel mortgage is superior to that of an agister.
4. **Agisters—Wrongful Possession.** There can be no agister's lien founded on wrongful possession.

5. *Agisters—Attachment.* One who has a lien for the care of live stock, waives it by suing for the amount of the debt and causing the property covered by the lien to be attached.
6. *APPEAL AND ERROR—Instructions.* It is error for the trial court to refuse to give proper instructions when requested.

Error to the District Court of Lincoln County, Hon. Arthur Cornforth, Judge.

Messrs. GOUDY & GOUDY, Mr. THOMAS MCGOVERN, for plaintiff in error.

Mr. CHAS. H. BEELER, Mr. FLOYD J. WILSON, Mr. FREDERICK SASS, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

PLAINTIFF below, Dell Hill, brought this action against F. J. Rhule and others for damages for conversion of fourteen head of horses. The defendants for their affirmative defense alleged that the stock "is in the possession of one of the defendants, to-wit. F. J. Rhule," and that his right to possession is founded upon an agister's lien. Trial was to a jury. Plaintiff's motion for a directed verdict was denied. Verdict was for defendants. Plaintiff brings error.

Some questions are raised by defendants in error regarding the sufficiency of the record and the bill of exceptions to authorize a review by this court of the cause. We find the record and bill sufficient. The record shows a final judgment, and it is to be regarded as such although the clerk's certificate uses the term "all court orders."

The principal contention of the plaintiff in error is that under the undisputed facts, the defendant Rhule lost or waived his agister's lien, if he ever had one, and therefore did not establish his defense.

On May 26, 1918, plaintiff left the horses on a farm in Lincoln County in the care and custody of the defendant Rhule. Thereafter defendant removed the property to Kit Carson County. On October 5, 1918, a mortgagee of

the horses took possession of them and took them back to Lincoln County. Defendant surrendered possession of the stock to the mortgagee without making any attempt to preserve his lien, if that could be done. He thus lost his agister's lien. It is essential to the attachment of the statutory lien that the agister should have possession and control of the animals. *Auld v. Travis*, 5 Colo. App. 535, 39 Pac. 357; *Tabor v. Salisbury*, 3 Colo. App. 335, 33 Pac. 190; 3 C. J. 33. The defendant Rhule lost possession and control when the mortgagee assumed it, and so the agister's lien was lost. The defendant could not, even if he desired, retain possession, because the chattel mortgage was in force before any agister's lien accrued. The holder of the chattel mortgage was not divested of his lien by any claim of the agister. *Ellison v. Tuckerman*, 24 Colo. App. 322, 134 Pac. 163; *Rohrer v. Ross*, 53 Colo. 328, 125 Pac. 489, Ann. Cas. 1914B, 315.

Neither the mortgagee nor the owner nor any one on their behalf ever returned the horses to defendant Rhule. He regained possession of the animals by suing out a writ of attachment in a justice court in a proceeding, not against plaintiff, but against one E. A. Hill. If such proceedings were void, and they are regarded in the briefs on both sides as void, then the possession thus obtained or regained was wrongful, and there can be no agister's lien founded on wrongful possession. 3 C. J. 33. Nor does wrongful possession revive any lien.

Again, defendant lost his lien by instituting the proceedings in the justice court against E. A. Hill. They were inconsistent with any claim against plaintiff. They were upon the same alleged debt. In *Crismon v. Barse, etc. Co.*, 17 Okla. 117, 87 Pac. 876, it was held that one who has a lien for pasturing live stock, waives such lien by suing for the amount of the debt and causing the property covered by the lien to be attached. The court said:

"Where one by contract or statutory provisions has a special lien upon property to secure the payment of a debt, he must either enforce his lien or he may attach the prop-

erty, if legal grounds exist therefor, but he cannot acquire both liens on the same property to secure the payment of the same debt. They are inconsistent, and cannot coexist in favor of the same person."

To the same effect is *Fein v. Wyoming L. & T. Co.*, 3 Wyo. 331, 22 Pac. 1150.

Under the authorities above cited, it is clear that the verdict for the defendant is not supported by the evidence, and furthermore, it is error to refuse to give plaintiff's requested instruction reading as follows:

"The court instructs the jury that if they believe from the evidence that the defendant Rhule was entitled to an agister's lien, but sued for the amount of the debt and caused the property carried by the lien to be attached, that the defendant Rhule thereby lost his lien."

For the errors above indicated, the judgment is reversed, and the cause remanded for new trial, on the question of damages only.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE DENISON concur.

No. 10,231.

Gwillim, et al. v. Asher.

Decided January 9, 1922. Rehearing denied March 6, 1922.

Action to set aside alleged fraudulent conveyances. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. PLEADING—*Fraudulent Conveyance—Cause of Action. Allegations*

of a complaint to set aside alleged fraudulent conveyances reviewed and held to state but one cause of action.

2. **FRAUDULENT CONVEYANCES—*Husband and Wife*.** The conveyance of real property by a husband to his wife with knowledge on her part of his fraudulent intent in so doing, is void as against his creditors.
3. **PLEADING—*Conclusions*.** Where sufficient facts are set out in a complaint to state a cause of action, allegations of conclusions may be treated as surplusage.

Allegations of a complaint to set aside alleged fraudulent conveyances reviewed and held sufficient.

4. **FRAUDULENT CONVEYANCES—*Creditors*.** In an action to set aside alleged fraudulent conveyances, it is not necessary that the plaintiff should have been a creditor before the execution of the deeds, or should have been led into giving credit to the debtor under the belief that he owned the property in question.
5. ***Record—Knowledge of Grantee*.** By withholding deeds from record with knowledge of the fraudulent intent with which they were given, the grantees become active parties to the fraud.
6. **APPEAL AND ERROR—*Evidence*.** Evidence held sufficient to support the judgment for plaintiff in an action to set aside fraudulent conveyances.
7. **FRAUDULENT CONVEYANCES—*Consideration*.** A wholly inadequate consideration from a wife to her husband for the transfer of real property, will not defeat an action by a creditor to set aside the conveyance as fraudulent.

Error to the District Court of El Paso County, Hon. Arthur Cornforth, Judge.

Mr. SAMUEL H. KINSLEY, Mr. LEON H. SNYDER, for plaintiffs in error.

Mr. W. D. LOMBARD, Mr. C. B. HORN, Mr. WILLIS L. STRACKAN, Mr. EUGENE D. PESTON, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE defendant in error a judgment creditor of R. J. Gwillim, brought suit against him, Janet, his wife, and Gwladys and Gwendolyn, his daughters, to set aside two certain conveyances of land from said R. J. Gwillim to his said relatives. The plaintiff had a decree and the wife and daughters bring error, and move for *supersedeas*.

They attack the complaint on two grounds: 1. That two causes are stated in one count; 2. That the facts stated are insufficient. They also claim that the evidence is insufficient to support the decree.

1. The complaint alleges that on December 1, 1919, plaintiff began suit against R. J. Gwillim, and on August 4, 1920, recovered a judgment therein; that December 1, 1919, Gwillim was owner of record of two parcels of real estate, viz., a ranch, and a house in Colorado Springs; that December 13, 1919, he filed or caused to be filed for record a deed of the ranch, dated November 9, 1917, from himself to Janet, his wife, and July 8, 1920, a deed of the house, dated September 24, 1918, from himself to his two daughters; that said deeds were without consideration and for the purpose of defrauding his creditors, particularly the plaintiff, and "were executed with a view to contracting future obligations" and "with fraudulent intent * * * to the contracting of future obligations" and left Gwillim without property to satisfy plaintiff's judgment and rendered him insolvent; that while said deeds remained unrecorded Gwillim retained the property and represented himself to be the sole owner; that he was and is the equitable owner and that said grantees hold in trust for him and that said trust was created with fraudulent intent on his part to the contracting of future obligations, which was known to his grantees.

We think this states but one cause of action. The substance of the pleading is clear though its expression is confused. Gwillim conveyed all his property to his wife and daughters to prevent plaintiff from collecting his judgment. That the conveyances were far apart in date and record and to different grantees is immaterial, since

it appears that they constitute one fraudulent transaction on the part of the grantor, and, because they knew his intent, on the part of the grantees also.

If we test this by Mr. Pomeroy's rule we get the same result; there is but one primary right in plaintiff and one corresponding duty in defendants, that is to hold Gwillim's property for application to his debts, and but one violation thereof, that is the transfer by defendants with a common purpose to avoid that duty. Pom. Rem. & Rem'l Rights, §§ 1, 452-459, 518-522. *Farmers High Line Canal & Res. Co. v. Webber*, 70 Colo. 348, 201 Pac. 555.

2. Does the complaint state a cause of action? We think it does.

Plaintiffs in error say that since Gwillim is not shown to have been indebted at the date of the deed to the wife and since it left him solvent, with property in his name and control, that deed was valid and her knowledge of his fraudulent intent to incur future obligations and escape them by means of these deeds was immaterial and so no cause is stated against the wife. We do not agree with this argument. If the wife accepted a gift of land from her husband knowing such intent she had no equity in the land as against his creditors. The effect of the allegations is to make the two deeds part of one fraudulent transaction.

True, as this court has held, a solvent man may give his wife property to protect her against his future misfortunes, but if the gift is part of a scheme to dispose of all his property by unrecorded deeds, and then to incur obligations and escape them, and she knows it, the case is different.

The allegation that the grantor was still the equitable owner may be a conclusion of law, though in this jurisdiction it would seem not (*Rice v. Bush, et al.*, 16 Colo. 484, 27 Pac. 720); but the alleged fraudulent purpose and acts show him to be the equitable owner so far as his creditor's rights are concerned. So of the allegation of a secret trust. The trust results from the conveyance with-

out consideration for a fraudulent purpose known to the grantee; sufficient facts, therefore, are alleged to support the legal conclusions and thus the allegations of such conclusions become surplusage. The fraudulent purpose vitiates the whole transaction; the doctrine of trust and equitable title is but equity's method of righting the wrong.

The allegation that the deeds were made "with a view to the contracting of future obligations" and "with fraudulent intent * * * to the contracting of future obligations" is not a conclusion of law, and, taken with the allegation that said deeds were made to defraud creditors, amounts to an allegation that the deeds were made with intent to incur and escape future obligations, and, though not as clear as might be, we think the complaint fairly construed is sufficient.

It is said that the complaint does not allege that Gwillim was the owner of the property but merely that he was the owner of record, and that that is not enough. If this position be correct, the complaint should be amended on affirmance of the judgment. The error is not of sufficient importance to justify us in reversing the case on that ground.

It is also claimed that the complaint does not definitely or sufficiently show the grantees' knowledge of the acts constituting Gwillim's fraud. We think a fair construction of the complaint is that it alleges such knowledge.

It is also claimed that the complaint is insufficient in that it does not show that the plaintiff was injured by the conduct of the defendants, since it does not show either that he became a creditor before the deeds were actually delivered or that he trusted Gwillim relying upon his apparent ownership of the property, being deceived by the fact that the deeds were not recorded.

We do not think that it is necessary that the plaintiff should have been a creditor before the execution of the deeds, or should have been led into giving credit to the debtor under the belief that he owned the property in ques-

tion, in order to create a cause of action, although those situations are the common ones in actions of this sort. If it is true that Gwillim, with the knowledge of his grantees, conveyed all his property to them with intent to defraud, and if this was done and the deeds withheld from record for the purpose of assuming obligations in the future and escaping those obligations by the subsequent record of these deeds, the case, we think, stands upon the same footing as if the deeds had been made at the date of their record.

By withholding the deeds from record with knowledge of the fraudulent intent the grantees became active parties to the fraud. *Stockgrowers Bank v. Newton*, 13 Colo. 245, 22 Pac. 444. Even though not deceived or misled to give credit, how does such a creditor's position differ from that of one whose credit antedates the deed but who does not show that he has granted credit especially upon the conveyed property? Such a creditor is not required to show that he was deceived; he is presumed to have granted credit on the general good standing of his debtor and the debtor is required to retain his property to meet the debt. Can it be that by secretly making conveyance before incurring the indebtedness he can alter that situation and accomplish what would have been unlawful if done at the time it was first made known by record? Can a court of equity sanction such a transaction?

We have considered this point as if the grantee's knowledge of the fraudulent purpose were necessary to the plaintiff's case but we are not to be understood so to hold. *Mulock v. Wilson*, 19 Colo. 296, 35 Pac. 532; *Gregory v. Filbeck*, 12 Colo. 379, 21 Pac. 489; *Gwynn v. Butler*, 17 Colo. 114, 28 Pac. 466; *Wilcoxon v. Morgan*, 2 Colo. 473.

3. It is also claimed that the evidence is insufficient. We cannot say so. We have examined all of the testimony from beginning to end. The evidence of Gwillim's fraudulent intent is strong and there is some evidence to support the charge of complicity with him by the other defendants.

It is urged that there was a sufficient consideration

for the conveyance to Mrs. Gwillim, because she assumed a mortgage of \$3500; the value of the land conveyed to her, however, might, under the evidence have been found to be \$12,000. *Regan v. Turner*, 69 Colo. 194, 193 Pac. 557.

It is further claimed that the daughters paid a valuable and adequate consideration for the property conveyed to them, which was a house and lot in Colorado Springs. Their claim is that they paid a mortgage of \$600 and cancelled an indebtedness of about \$400, the items of which were not forthcoming in the evidence, and agreed to pay \$17.98 per month life insurance premiums on their father's life till his death for the benefit of their mother. The property, however, may have been found from the evidence to have been worth \$3,000, and the agreement to pay the future life insurance premiums is, in effect, a transfer, *pro tanto*, of the margin of \$2,000 to the mother. The implication in *National Bank of Commerce v. Appel Clothing Co. et al.*, 35 Colo. 149, 83 Pac. 965, 4 L. R. A. (N. S.) 456, 117 Am. St. Rep. 186, is, that in a case like the present, such a transaction would be unlawful.

Some objections were made to evidence, but they are not argued and we do not notice them.

Supersedeas denied and judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

SECURITY BENEFIT ASSOCIATION *v.* VERDERY.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action on life benefit certificate. Judgment for plaintiff.

Affirmed.

1. **INSURANCE—Life Benefit Certificate—Beneficiary.** Where a divorced wife continues to pay the premiums on a life benefit certificate, taken out by the husband, which were accepted by the association with full knowledge that the husband had disappeared; that the wife had remarried; and that she was paying the premiums as the beneficiary designated in the certificate; the association is estopped to dispute her right to recover.
2. **DEATH—Presumption.** The proofs necessary to raise the presumption of death of a person after disappearance and absence for seven years, must depend upon the facts in each particular case.
3. **INSURANCE—Death of Assured—Presumption from Disappearance and Absence.** Evidence reviewed and held sufficient to support findings of the trial court that plaintiff had made due and diligent search and inquiry before bringing suit to recover upon a life benefit certificate, the assured having disappeared and remained absent for more than seven years.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Mr. WILLIAM H. WADLEY, for plaintiff in error.

Mr. GEORGE P. STEELE, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THE suit is by Xenia A. Verdery, on a fraternal benefit certificate upon the life of Max H. Zimmerman, for \$3,000.00. Mrs. Verdery at the time of the issuance of the certificate was Zimmerman's wife. The certificate is

dated March 7, 1907, and five years later Zimmerman disappeared. In August, 1914, plaintiff secured a divorce from him on the ground of desertion and later married Verdery. Judgment was for plaintiff and the Association brings the record here for review. In this opinion the parties are designated as in the court below.

It is the theory of plaintiff that notwithstanding her divorce from the assured and marriage to another, she is entitled to recover, and that the testimony showing the disappearance and continued absence of Zimmerman, for more than seven years, without tidings, for the purpose of this action, is equivalent to proof of death.

The principal contentions of defendant are, that in no event can plaintiff recover, because she was not the wife of Zimmerman at the end of the seven years period immediately following his disappearance; and further, that the facts shown in connection with his disappearance and continued absence are not sufficient to raise the presumption of death.

Defendant to defeat the action relies, among other things, upon chapter 139, Colorado Session Laws, 1911, entitled "Fraternal Benefit Societies." Section 6 thereof restricts beneficiaries under fraternal benefit policies to relatives by blood or marriage, or those dependent upon the member; and also relies upon the by-law of the society passed to conform to the provisions of the foregoing section of the state law, as follows:

"The beneficiaries shall be confined to the families, heirs, blood relatives, or to persons dependent upon the member. Provided, that a member having no spouse or children living may, with the consent of the Order, make a charitable institution the beneficiary in those states where such designation is permitted. The provision as to heirs and blood relatives herein shall be held to mean relationship not further removed than cousin in the first degree. In all cases the person intended as beneficiary shall be specifically named in the beneficiary certificate. No payment shall be made upon any benefit certificate to any person who

does not bear the required relationship at the time of the member's death."

The statute and the by-law were both enacted years after the issuance of the certificate involved. But it is urged that they are both retroactive and that by their terms plaintiff is precluded from recovery. These questions, under the facts disclosed, need not be determined, since it appears that plaintiff continued, for more than seven years after the disappearance of Zimmerman, to pay the premiums upon the certificate in question, which were accepted by the Association with full knowledge that Zimmerman had disappeared that plaintiff had been divorced, was remarried and was paying such premiums as the beneficiary designated in the certificate. Plaintiff paid such premiums both before and after her divorce from the insured. Under such circumstances the Association ought not to be heard to dispute her right of recovery.

The only other matter which need be determined is whether the presumption of death arises from the proven facts. Counsel for defendant relies upon *New York Life Insurance Co. v. Holck*, 59 Colo. 416, 151 Pac. 916, as authority showing the proofs adduced to be insufficient. It is to be noted, however, that it was specifically held therein that "each case must necessarily depend upon its own facts," and limited the law there announced accordingly. In that case there was much testimony to the effect that the insured had, prior to his disappearance, threatened to leave home on account of unpleasant domestic relations. He left immediately following a quarrel with his wife, and later returned for the purpose of bidding good-bye to his daughter. Afterward he sent the child presents by express, and there was testimony of his having subsequently been seen alive upon several occasions in various parts of the country.

In this case there is not only no evidence of domestic difficulties, but the testimony indicates that the insured led a pleasant and contented home life, and that he was the father of a young son to whom he appears to have

been greatly attached. The husband and father left home in the morning, with the understanding that he would meet his wife later in the day to attend an art exhibit, and was never seen again in the city.

There is a suggestion to the effect that he left with another woman, but nothing in the record supports this, nor is there any fact or circumstance shown which tends to explain his departure, long continued absence or subsequent silence, except that of death. There is testimony that he appeared at the home of a brother in Illinois a few weeks after his disappearance, but nothing further seems to have been heard of or from him. So far as the record discloses he appears to have utterly disappeared during the more than seven years between his departure and the commencement of this suit, no trace of him whatsoever having been reported during that entire period, except as above noted.

It is shown that the wife communicated with all the relatives of the missing man, of whom she had knowledge, except a sister, with whom the insured was not on friendly terms. She notified the members of the Association, watched the papers for news of him, talked with those of his associates and acquaintances whom she knew, and seems to have done all that could be reasonably expected of her to do under the circumstances. There is ample competent testimony to support the findings of the trial court that plaintiff made due and diligent search and inquiry before suit brought, and we are not disposed to disturb them.

It was held in *Modern Woodmen of America v. White*, 70 Colo. 207, 199 Pac. 965, that whether the inquiries in a given case showed sufficient diligence must depend upon its particular facts, circumstances and conditions. That decision is authority for upholding the sufficiency of the diligence of search shown herein. We cite the following additional decisions which support the conclusion of the trial court that due and diligent search and inquiry were

made by plaintiff: *Spahr v. Mutual Life Co.*, 98 Minn. 471, 108 N. W. 4; *Mackie v. Grand Lodge*, 100 Kan. 345, 164 Pac. 263; *Richey v. W. O. W.*, 184 Iowa, 10, 168 N. W. 276, L. R. A. 1918F, 1116; *Miller v. Sovereign Camp*, 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095; *Lichtenhan v. Prudential Ins. Co.*, 191 Ill. App. 412; *Page v. Modern Woodmen*, 162 Wis. 259, 156 N. W. 137, L. R. A. 1916F, 438, Ann. Cas. 1918D, 756; *Kaufmann v. N. Y. Life* (Cal. App.) 186 Pac. 360; *Darrell v. Mutual Ben. Life Ins. Co.* (Cal. App.) 186 Pac. 620.

No other question argued is of sufficient importance to merit discussion. The judgment is in accord with exact justice, is fully warranted in fact and law, and should therefore be affirmed. It is so ordered.

MR. JUSTICE DENISON dissents.

No. 9890.

WEISS v. GOAD.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action for libel. Judgment for plaintiff.

Reversed.

LIBEL AND SLANDER—*Truth of Charge.* On review of the case in an action for libel, held that the defense of "truth of the charge" was established by the evidence, and judgment for plaintiff reversed.

Error to the District Court of Rio Grande County, Hon. W. N. Searcy, Judge.

Mr. JAMES P. VEERKAMP, for plaintiff in error.

Mr. JESSE STEPHENSON, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

GOAD had a verdict and judgment against Weiss for \$1000.00 for libel. The libel was an accusation that Goad stole \$372.98 from the county of which he was sheriff.

One of the defenses was the truth of the charge. It appears, from the libel itself, that the accusation was not of larceny by physical taking, but of obtaining unlawfully. If then the \$372.98 was obtained unlawfully by fraud or otherwise, the charge was true.

Goad was shown by the evidence to have presented to the board of county commissioners a bill for items of expense to the amount of \$372.98, which items were all included in another bill presented at the same time. Both bills were allowed and he got the money on them both.

He says in his testimony that this was a mistake; that the county attorney had asked him to itemize his expenses, and that he therefore itemized them separately, and that he did not know he had collected the money for them twice till the expert who examined his books told him. He testifies, however, that he put in both bills at the same time, verified by oath, knowing that said items were duplicated, and that he knew they were duplicated when the bills were allowed and he got the money on them without ever calling the board's attention to the fact. He also testifies that in other cases he took money knowing he was receiving pay twice, and admits that he took duplicate pay many other times,—which he says were oversights. Under these admissions we must say that the evidence was insufficient to justify the verdict.

Reversed and remanded.

MR. JUSTICE WHITFORD dissents.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9959.

CAPITAL LIVESTOCK INSURANCE Co. v. CAMPION, ET AL.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action on policy of insurance. Judgment for plaintiff.

Affirmed.

1. **INSURANCE—Application.** Where an insurance policy on livestock provided that the company should not be liable for the death of any cow which was or became bred, but the application contained no answers to questions concerning that subject and was accepted by the company's agent and home office, it was estopped to raise the question as a defense to an action on the policy.
2. **EVIDENCE—Hearsay—Harmless Error.** Where a party was allowed to testify to communications received from his foreman as to losses of cattle, the error, if any, was harmless where the facts testified to were corroborated by a witness of the opposing party and were fully established by the foreman himself.
3. **INSURANCE—Payment of Premium—Waiver.** A condition of an insurance policy that the insurance should not be in force until the premium was paid, could be waived by a general agent of the company.
4. **General Agents—Authority.** General insurance agents are empowered to waive conditions of forfeiture in a policy, and their knowledge is the knowledge of the insurer, notwithstanding any excess of their actual authority.

Error to the District Court of the City and County of Denver, Hon. John T. Shumate, Judge.

Mr. LESLIE E. HUBBARD, Mr. SAMUEL N. HAWKES, Mr. RALPH E. C. KERWIN, for plaintiff in error.

Mr. H. A. HICKS, Mr. A. T. MONSON, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action by insured against insurer upon a policy of live stock insurance to recover for losses sustained. Judgment was for plaintiff, and defendant brings the case here.

A large number of alleged errors are assigned. Many of them are more or less relevant to that defense set up in the answer which, in substance, is that the live stock lost consisted of cows that were bred at the time of the issuance of the policy or became bred thereafter. This alleged fact was dwelt upon at the trial by defendant because of a provision in the policy to the effect that the company "shall not be liable for the death of any animal, * * * if a cow and it be or become bred." In this connection, the rulings complained of either were not erroneous or constituted but harmless error. There was no representation in the application for insurance as to whether the cows were bred. The application, and subsequently the policy, described the property insured as follows: "604 head of mixed Hereford and Shorthorn cattle, * * * viz: 580 head of cows from 3 to 7 years old, and 24 head of bulls from 3 to 4 years old, all such animals being located near Ellsworth, Nebraska." The location was further described as "Section 30," etc., and from all that appears in the record the cattle were kept in one herd, and it was so understood by both insurer and insured, and both parties should be presumed to know that the cows, or some of them would likely become bred. The insurer both by its agent and at its home office accepted the application which contained no answers with reference to the condition of the cattle in respect to being or becoming bred, but did contain questions and answers as to other conditions. The defendant should be deemed to be estopped to raise the question now. Furthermore, the evidence of the plaintiffs shows that the losses occurred from causes unaffected by any condition of the animals resulting from being bred. No evidence was offered by

defendant to the effect that the cows were bred. There is no reversible error in the record as to this branch of the case.

Plaintiffs' witness A. J. Campion was allowed to testify as to communications he had received from his ranch foreman at Ellsworth, Nebraska, concerning the occurring of losses or death of cattle. If this was admission of hearsay evidence, the record shows that the error is harmless. Defendant's own witness Trier gave testimony in corroboration of Campion, and the facts testified to by Campion, in this connection, were fully established by the testimony of the ranch foreman himself.

It is contended that the policy was never in force because the premium was not paid until after the last loss was sustained. Reliance is had upon a clause of the policy providing that "the insurance shall not be in force or effect until and unless * * * the premium thereon is paid." Provision of such clauses may be waived. They may be waived by a general agent. In the instant case, the provision was waived by the acts of the defendant's general agent, the firm of Drake & Sons, Insuranciers, Inc. It retained the premium after it was paid. The premium was paid according to the agreement between the general agent and insured, the agent allowing 60 days for the payment. The controlling fact, however, is that the general agent waived the requirement that premium be paid in advance. There is no error in the record, in this connection. 25 Cyc. 1517; *Insurance Co. v. Friedenthal*, 1 Colo. App. 5, 27 Pac. 88; *Schoneman v. Insurance Co.*, 16 Nebr. 404, 20 N. W. 284.

The plaintiff in error contends that whatever waiver there was of any provision of the policy, was by the acts of Drake & Sons, and that this firm, or Drake, had no authority to waive any clause or the provisions thereof. The contention further is that Drake was not a general agent, but only a soliciting agent, and reliance is placed upon the provisions of the insurance code, paragraph 9,

section 3107 R. S. 1908, to the effect that no statement or declaration made by an agent, not contained in the application, shall be taken or considered as having been made by, or brought to the notice or knowledge of, the company, or as charging it with any liability by reason thereof. If Drake, or his firm, was a mere soliciting agent, this statutory provision might have some application in the instant case, but he was not. He was a general agent, having express authority to appoint and supervise soliciting agents, and when he undertook to take applications he was still a general agent. Performing the duties of a soliciting agent did not divest him of his character as a general agent, in which capacity, at various times, he appeared to act and deal with plaintiffs, and in which character he was held out by defendant to the general public. From various facts, most of them undisputed, appearing in the record, Drake & Sons should be treated as general agents. As such general agents they were empowered to waive conditions of forfeiture in the policy, and it should be held that their knowledge is the knowledge of the insurer, notwithstanding any excess of their actual authority. 14 R. C. L. 1158.

It seems clearly established by the record that the policy of insurance was issued and became effective; that the insured suffered the losses intended to be indemnified by the insurer; and, that plaintiffs were guilty of no fraud or concealment. Under such circumstances, the insured ought, in justice, to recover. In our opinion the record shows no such error as affected the substantial rights of the defendant.

The judgment is affirmed.

MR. JUSTICE TELLER, and MR. JUSTICE DENISON agree with the conclusion.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 9980.

TAYLOR, as Receiver v. SAUNDERS.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action in damages for death by negligent act of railway company. Judgment for plaintiff.

Affirmed.

1. MASTER AND SERVANT—*Relation of.* Whether in any particular case an employe was acting within the scope of his employment, and was in fact an employe, is to be determined with a view to all of the surrounding circumstances.
2. *Scope of Employment.* A motorman for a railway corporation lost his life while asleep in a car barn of the company which was destroyed by fire through its negligence. Held, that under the circumstances of this case the relationship of master and servant existed between the company and the employe at the time of the accident, and that the employe was acting within the scope of his employment when he met his death.

Error to the District Court of Teller County, Hon. John W. Sheafor, Judge.

Mr. HORACE G. LUNT, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for damages for death by wrongful act. It was brought by the widow of Wesley W. Saunders, deceased, who met his death while in the employ of the defendant, the receiver of The Colorado Springs & Cripple Creek District Railway Company. The cause of action is grounded on negligence. There was a verdict and judgment for plaintiff. Defendant brings the cause here for review.

The principal, and in effect the only, contention of the plaintiff in error, defendant below, is that the relation of

master and servant was suspended at the time the employe Saunders met his death.

Saunders' employment was that of a motorman. His usual duty was to operate a car which left the car barn shortly before six o'clock in the morning and returned at about 9:30 a. m. He made his regular run, on November 20, 1918, and at about 3:30 p. m. on that day he was required to report at the car barn and to take out another car. He did this, taking a shift ordinarily worked by another motorman, and remained with the car until 3:30 a. m. the next morning, when it returned to the car barn. He then remained in the car, and fell asleep. Shortly afterwards, and about 4:30 a. m., the car barn caught afire. Saunders lost his life in the fire. There is evidence that the burning of the barn was due to the negligence of the defendant and of a fellow-servant of Saunders. As to Saunders, or plaintiff, the negligence was undoubtedly actionable, if the relation of master and servant existed at the time of the fire and of Saunders' death.

Whether in any particular case an employe was acting within the scope of his employment, and was in fact an employe, is to be determined with a view to all of the surrounding circumstances. Every case will differ necessarily from every other case. 18 R. C. L. 580, sec. 86.

When Saunders reached the car barn at 3:30 a. m., after about twelve hours continuous service, there only remained to him two hours and fifteen minutes before the time for reporting for his regular run or shift. His home was one and one-half miles distant from the barn. Had he then gone to his home, about an hour and a half would have been consumed in going to and coming back from the house. To have gone home would have also resulted in the loss of sleep and impairment of his physical condition. His remaining in the car was not assuming a position of peril merely for his own pleasure or convenience. Had he remained in the car simply to obtain a rest, it would have been exercising a reasonable privilege of an employe. *Jacobson v. Merrill, etc. Mill Co.*, 107 Minn. 74,

119 N. W. 510, 22 L. R. A. (N. S.) 309. The defendant did not prohibit employes from sleeping in the car barn. The time for making the next run being so near at hand, Saunders was acting within the course of his employment by waiting in the car for the next shift instead of going elsewhere in the meantime. *Houston, etc. Co. v. McHale*, 47 Tex. Civ. App. 360, 105 S. W. 1149.

In our opinion, Saunders met his death while the relation of master and servant subsisted between him and the defendant.

There is no error in the record. The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,016.

STONE, ET AL. v. THE PEOPLE.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Plaintiffs in error were convicted of highway robbery.

Affirmed.

1. **CRIMINAL LAW—Continuance.** The matter of a continuance rests in the sound discretion of the court, and under the facts of this case it is held the discretion was not abused.
2. **Statutory Construction—Offense on County Line.** Under the provisions of section 1974, R. S. 1908, where a criminal offense is committed on a public highway between two counties, the trial may be had in either county.
3. **Special District Attorney—Appointment.** The condition precedent for the appointment of a special district attorney having been found by the court, and there being nothing in the record

to rebut the correctness of the finding, error assigned thereon is overruled.

4. *Severance.* Where a motion for severance under the provisions of section 1981, R. S. 1908, was denied, and on the trial no objection was made on behalf of either defendant to any evidence which could by any possibility be considered as admissible against one and inadmissible against the other, the ruling of the court in denying the motion is upheld.
5. *Endorsement of Witnesses.* The names of witnesses, the materiality of whose testimony is first learned by the district attorney upon the trial, may be properly endorsed on the information by order of court, in the absence of any showing by defendants of surprise or prejudice.
6. *Sufficiency of Evidence.* Evidence reviewed and held sufficient to support a verdict of guilty.
7. *APPEAL AND ERROR—Jury Findings.* Findings of a jury upon conflicting evidence will not be disturbed on review.

Error to the District Court of Jefferson County, Hon. S. W. Johnson, Judge.

Mr. WILLIAM A. BRYANS, JR., Mr. GEORGE B. CAMPBELL, for plaintiffs in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFFS in error, (hereinafter referred to as defendants) were convicted of highway robbery and sentenced to a term of five to six years in the penitentiary. To review that judgment they sue out this writ.

Of the nineteen errors alleged the following propositions are presented in the briefs: 1. The denial of Woeber's motion for a continuance. 2. That the crime, if any, was not committed in Jefferson County. 3. The appointment by the court of A. D. Quaintance to represent the people

in the trial. 4. The overruling of Stone's motion for a severance. 5. The endorsement on the information of the names of two witnesses at the beginning of the trial. 6. That the verdict is not supported by the evidence.

1. When the case was called for trial defendant Stone was represented by attorney Bryans. Defendant Woeber was asked by the court if he had counsel. He said he had, one Waldron, who could not be present because he was trying cases in the city of Denver. The judge replied that Waldron had said that he was not attorney for the defendant. Woeber informed the court that he had seen Waldron that morning but that he, Woeber, could handle the case himself, saying, "I think I could go to trial without an attorney." Thereupon the court appointed Mr. George B. Campbell to represent this defendant. Woeber first objected to going to trial under the circumstances. The court reminded him that when the cause was set and he and attorney Waldron present they were informed that the cause must be tried, that a jury could not be kept longer, that Waldron had been notified, and that he had not asked a continuance.

"Mr Woeber. Wouldn't you reconsider and appoint Mr. Bryans as my attorney?

The Court. Sure if Mr. Bryans will serve.

Mr. Woeber. Is that all right with you Mr. Bryans to represent me?

Mr. Bryans. I have no objection to Mr. Campbell assisting in this case; I would be delighted to have him. I have known this young man a long time. * * * I would try to protect his interests * * *.

The Court. If Mr. Bryan's client Mr. Stone should in any way be interested opposite to you (Woeber) I would not want him to represent but one of you. I appointed Mr. Campbell so as to look after you especially."

The record discloses nothing contrary to the foregoing. No further objection appeared and no additional showing was made. No exceptions were saved. That this matter rested in the sound discretion of the court and that that

discretion was not abused seems clear. *Roberts v. People*, 9 Colo. 458, 465, 13 Pac. 630; *Byers v. McPhee, et al.*, 4 Colo. 204, 207.

2. The transaction in question occurred on the fenced public highway dividing the counties of Jefferson and Arapahoe. It is contended that the center of this highway is the county line and that the acts here under investigation were performed on the Arapahoe side thereof, hence the cause should have been tried in Arapahoe County. Section 1974 R. S., 1908 provides:

"When an offense shall be committed on a county line, the trial may be in either county divided by such line."

If the word "line" here used is to be given its geometrical definition, if it is merely the shortest distance between two points and has neither breadth nor thickness, defendants' argument has merit. Our constitution merely provides that the accused shall be entitled to trial "by an impartial jury of the county or *district* in which the offense is alleged to have been committed." Art. II, sec. 16, Colo. Const.

It is inconceivable that the legislature, in the enactment of section 1974, *supra*, had in mind a geometrical "line", or were indulging in any such hair-splitting in the passage of the statute. It merely took cognizance of the fact that in most cases these county lines are highways and that numerous offenses similar to the one charged here are committed thereon in every jurisdiction. That interpretation is a reasonable one, is consistent with the constitutional provision above cited, and involves no prejudice to the defendants. We therefore unhesitatingly adopt it.

3. When this cause came on for trial the district attorney, who had filed the information, was not present, and the court appointed Mr. Quaintance to prosecute. Mr. Bryans objected orally because no showing had been made justifying the appointment. The court made an oral finding that "the district attorney is not performing the duties of his office and he is absent from the court and that there is no one, no official of his office, who is here able to per-

form the duties of the office of the district attorney."

"In case the district attorney shall fail to attend upon the criminal court at any term thereof, or part of any term, such court shall appoint some competent attorney-at-law as special district attorney, who shall in the meantime perform the services of the district attorney." Sec. 1577 R. S. 1908.

The statutory condition precedent to such an appointment appears to have existed and been found by the court and the record discloses nothing to rebut the presumption of the correctness of that finding, hence the legality of the appointment. *Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

4. Section 1981 R. S. 1908, reads:

"When two or more defendants are jointly indicted for any felony, any defendant against whom there is evidence, which does not relate to the reputation of such defendant, and which would be material and admissible as to such defendant, if tried separately, but which would be inadmissible as to any other of said joint defendants if tried alone, such defendant against whom evidence as aforesaid, is material and admissible, shall be tried separately. In all other cases, defendants jointly indicted or prosecuted, shall be tried separately or jointly in the discretion of the court."

Defendant Stone filed a motion for severance. His affidavit recited:

"That there is evidence material to the defense of this defendant which does not relate to the reputation of this defendant, which is admissible as to the defendant, if he be tried separately, but which is inadmissible as to any other defendant if tried alone."

Thus far the affidavit in no respect supports the motion. *Moore v. People*, 31 Colo. 336, 344, 73 Pac. 30. The affidavit further recites:

"That there is material evidence not relating to the reputation of any other defendant which is admissible as

against such defendant, if tried alone, but if admitted in a joint trial will be prejudicial to this defendant because such evidence would be inadmissible as against this defendant if tried alone."

If this portion of the affidavit is good under the statute (a question which we do not decide) the record discloses no further showing as to what this evidence was. No such evidence developed in the trial. No objection was made on behalf of either defendant to any evidence which could by any possibility be considered as admissible against one defendant and inadmissible against the other.

5. Before the jury was sworn to try the case the people asked leave to endorse upon the information the names of the witnesses Ulysses H. Baker and W. P. Doughty, the special prosecutor saying, "I did not know anything about these." Defendants objected to this endorsement.

"Mr. Bryans. We are taken by surprise, and if the court enters an order endorsing either or both of these names on the information we shall insist upon and respectfully request a continuance of the trial of this case.

Mr. Quaintance. If it is anything that would seek to take them by surprise, we won't endorse them.

The Court. You may have leave to endorse them.

Mr. Bryans. To the ruling of the court we reserve an exception."

Baker was an officer who arrested defendants. Doughty had an experience with them similar to that of the prosecuting witness and but a few minutes before the transaction here in question. Both witnesses testified without any further objection or request for continuance.

The presumption is in favor of the ruling of the court and that he found to be true the statement of the special prosecutor that these were witnesses "the materiality of whose testimony are first learned by the district attorney upon the trial." Sec. 1958 R. S. 1908.

"No showing of surprise or prejudice was made by plaintiff in error. * * * Under this condition we can not say that the action of the court was reversible error."

Wickham v. People, 41 Colo. 345, 349, 93 Pac. 478.

6. On the question of the sufficiency of the evidence we quote from defendant's brief:

"A careful review of the evidence in this case shows conclusively that neither Stone nor Woeber participated in any criminal act, that there was not criminal intent on the part of either to commit a crime, that Stone was incapable of committing a crime, that Woeber according to the prosecuting witness took no part in placing the prosecuting witness in fear and made no threats against him."

This is the sum total of the argument on this point. It is justified only if we confine ourselves entirely to defendants' evidence and their construction of a portion of the testimony of the prosecuting witness.

This was a joint information against defendants and Charles Fletcher and Joe Sennett. Fletcher disappeared and Sennett is since deceased. These four men had been driving in Woeber's car and were returning to Denver on the Morrison road early in the afternoon. They had all been drinking and defendants' claim Stone was "sleepy drunk", and that, except for a few minutes when he got out of the car to help Woeber change a tire, he knew nothing of what was going on. Finding a flat tire they stopped, borrowed a vulcanizer from a passing motorist, and attempted to repair the puncture. Experiencing some difficulty in the process they halted the witness Doughty who was going in the opposite direction. Fletcher asked for repairs and being told that Doughty had none, but observing that he carried a spare tire, Fletcher jumped on the back of the car saying, "Let's take the tire." Driven off by Doughty he called upon the others for assistance. They all started toward the car and Sennett pulled a gun. Doughty drew his own gun and drove them back. If this testimony is to be believed Stone was then sober enough to participate.

"Q. And shortly after you drove off did you (Doughty) pass the stage? A. Yes.

Q. The Thomas stage? A. Yes."

The Thomas stage was coming toward Denver and was being driven by prosecuting witness Taylor who stopped his car just behind that of defendants because the road was blocked. Fletcher proposed to buy a tube of Taylor, then drew Sennett's gun and holding it on Taylor said, "Now will you sell us a tube?" Woeber and Stone were putting on the tire they had repaired by means of the borrowed vulcanizer. It blew out, then Fletcher and Sennett, holding the gun on Taylor, made him take off his tire and this they took to Woeber's car.

"Mr. Taylor. When I got out of the car he stuck the gun right up against me * * * stuck it right up against my ribs * * * he rubbed it up and down two or three times to remind me that it was there.

Q. Were you in fear of your life? A. Yes. * * * There were four outside of the machine and Stone was one of them.

Q. Did they act as though they were under the influence of intoxicating liquor? A. Slightly.

Q. Staggering? A. No sir. Fletcher said, 'This is the same as your death warrant if you report this to the police' and Sennett said, 'You know that any of us, any of the four of us, are liable to bump you off if you let this out.'

The four then drove rapidly away in Woeber's car and disappeared. They returned to Denver and a little later in the afternoon were arrested by Officer Koskulis for violating the speed laws. They first attempted to escape but were run down and captured. Koskulis says, "They jumped up and wanted to fight me * * * all of them." The officer took them to the city hall where he was told in their presence by the police captain that he already had their description and they were wanted for highway robbery on the Morrison road. Apparently they all understood this. The record discloses no denial on the part of any. The arresting officer says they had been drinking but none of them were drunk.

We think this is ample to show a determination on the part of the four men to commit highway robbery with a gun in order to get a tire for their machine; that save for the fact that he was armed and resisted, Doughty would have been the victim; that the machines stood so close together that all four must have been and were fully cognizant of the entire transaction; that all participated in it in various ways; that while neither Woeber nor Stone used the gun, or actually made threats against Taylor, they aided in the commission of the crime by their presence and encouragement and the tire was taken for Woeber's car, who put it on and drove away with it; that all of them were sufficiently sober to be perfectly conscious of what was going on and to participate in it; and that the conclusion reached by the jury was the natural and reasonable one in the light of all the evidence. The verdict cannot be disturbed merely because the evidence is conflicting, nor because it may seem to us that some links in it are not overwhelmingly established. *Hallack, et al. v. Stockdale, et al.*, 14 Colo. 198, 23 Pac. 340; *Mow, et al. v. People*, 31 Colo. 351, 358, 72 Pac. 1069.

Finding no reversible error in this record the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,040.

FOSTER, ET AL. v. COFFEY.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action to cancel deed; for partition of land, and division of personalty. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. **APPEAL AND ERROR—*Sufficiency of Evidence.*** The contention of plaintiff in error that the findings of the trial court are not sustained by the evidence, overruled.
2. **PLEADINGS—*Departure.*** A complaint alleged that the plaintiff was the owner of an interest in real property; held, that this was not an allegation of fee title, but was consistent with an allegation of equitable title set up in the replication, which did not constitute a departure.
3. **CONTRACT—*Statute of Frauds.*** While a contract may have been void under the statute of frauds, if it has been fully performed by one of the parties, it is binding on the other.
4. ***Specific Performance—Time.*** Time is not of the essence of a contract, unless so made specifically, or by the circumstances of the case; lapse of time is no objection to the specific performance of such a contract where the plaintiff has been in possession of the property.

Error to the District Court of Adams County, Hon. Samuel W. Johnson, Judge.

Mr. PAGE M. BRERETON, Mr. GRANT L. HUDSON, for plaintiffs in error.

Mr. HARRY S. CLASS, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error was plaintiff in a suit to cancel a deed given by Louise Coffey, his wife, one of the plaintiffs in error; for a partition of the land conveyed by said deed; and for a division of certain personal property alleged to be owned by plaintiff and his wife in common.

The complaint alleges that the plaintiff is the owner, and in possession, of an undivided one-half interest in certain described lands and water rights, the other half interest being in defendant Louise Coffey, which lands she has attempted to convey to her children by a former marriage, reserving to herself a life estate.

The wife's answer denies plaintiff's ownership of the land mentioned; and admits the execution of the deed to her children. The other defendants in the suit are the said children, whose answer presents no new issue.

Plaintiff, by replication, alleges that in 1899, prior to the marriage of plaintiff and defendant Louise Coffey, the said defendant agreed with the plaintiff that if, after their marriage, he took charge of the farm on which she was at that time living, being the premises described in the complaint, she would convey to plaintiff an undivided one-half interest therein, if the plaintiff should, in due season, pay a bequest of \$1,000.00 made by the will of Louise Coffey's deceased husband to each of her four children, which said bequests were a charge on the farm.

It is further alleged that the plaintiff has performed his part of said agreement, having from the time of his marriage forward, managed the farm in said contract mentioned, and paid the said bequests.

Plaintiff testified to the making of the agreement set up in the replication, and to his performance of it. His wife, in her testimony, denied that such an agreement had ever been made. There was a mass of testimony as to the plaintiff's business operations during the said years. The fact that the bequests were paid in accordance with the alleged agreement was not disputed. It appears that, through plaintiff's management, a fund was created from which adjoining lands were purchased, which, under the manage-

ment of the plaintiff, produced valuable crops. The proceeds of these crops, not applied in the purchase of other lands, as well as the proceeds of lands sold, were divided equally between the parties. The wife admitted that plaintiff had, at different times, requested a conveyance to him of one-half of the home farm, thus conceding that he claimed the interest which he now asserts had been promised him.

There being a direct conflict of evidence, the trial court might well have decided the case for the plaintiff solely upon the testimony as to the agreement. But there are other facts in evidence, bearing upon the question in issue, which the trial court might reasonably have regarded as supporting plaintiff's contention. The charge that the court's finding is not sustained by the evidence, is, therefore, without foundation.

It is objected, however, that the replication is a departure, because, it is said, the complaint alleged ownership in fee, while the replication set up an equitable title, derived from a contract executed upon the part of the plaintiff. The complaint did not, in terms, allege title in fee, but merely that the plaintiff was the owner, which language is consistent with an equitable title. We find no reason for holding that there is a departure.

That the defendants were not permitted to plead the statute of frauds is immaterial, because the evidence shows that the contract was executed upon the part of the plaintiff. So, though the agreement might have been void under the statute of frauds, it became binding upon the defendant when fully performed by the plaintiff.

There is no merit in the contention that the action was barred by the statute of limitations. Time is not of the essence of a contract, unless so made specifically, or by the circumstances of the case; and lapse of time is no objection to the specific performance of such contract, where the claimant has been in possession of the property. *Byers v. Denver Circle R. Co.*, 13 Colo. 552, 22 Pac. 951.

The evidence supports the court's findings, and the record shows no prejudicial error.

The *supersedeas* is denied, and the judgment affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE WHITFORD dissent.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE ALLEN, dissenting.

This is a suit brought by John J. Coffey, one of the defendants in error, against the plaintiffs in error and Effie Bernice Peterson, for the purpose, among other things, of quieting his title to an undivided one-half interest in and to a tract of land hereinafter referred to as "the home place." The plaintiff obtained a decree in his favor, adjudging him to be the owner of an undivided one half interest in and to the land. The defendants, other than Effie Bernice Peterson, bring the cause here for review.

Among the numerous contentions made by plaintiffs in error is that the court erred in overruling motions to strike portions of plaintiff's replication which, it is claimed, constituted a departure from the complaint. The court's ruling appears to be defended by plaintiff below on the theory that there can be no departure where the complaint alleges plaintiff to be an "owner" and the replication alleges, in effect, that he is an equitable owner. We do not find, however, that the pleadings in the instant case fit that theory.

The complaint contains three causes of action. The first is for partition, and alleges, among other things, that plaintiff and defendant Louise Coffey "are the owners" of the land. The second cause of action alleges that plaintiff "is the owner of an undivided one-half interest" in the land, and prays for the cancellation of a deed made by Louise Coffey purporting to convey such interest. The third cause of action is in the form of the usual complaint to quiet title under the code, and alleges that plaintiff "is the

owner and in possession of an undivided one-half interest" in and to the premises.

The separate answers of those defendants who are plaintiffs in error here each denied plaintiff's allegations of ownership in himself and set forth facts showing the legal and record title in themselves.

That portion of plaintiff's replication which defendants moved to strike out, reads as follows: (omitting parts)

"That the plaintiff and the defendant Louise Coffey, on to-wit, November 5, 1899, were lawfully married and ever since said time have been and now are husband and wife.

"That prior to the said marriage the defendant Louisa Coffey stated to this plaintiff that if they were married and if he took charge of the farm on which she was at that time living, being the same premises described in the complaint, * * * she would convey to the plaintiff an undivided one-half interest therein, and that it was understood and agreed between the plaintiff and the said defendant Louisa Coffey that if the plaintiff would marry the said defendant Louisa Coffey and would in due season pay the bequest in the will of James S. Foster, deceased, viz: the sum of \$1,000 to each of the four children, * * * and would make the improvements deemed necessary * * * not only would the said defendant Louisa Coffey convey a one-half interest in said premises, but that of all of the rents, * * * and all property, * * * plaintiff and the said defendant would share equally therein."

Other allegations are set forth to show what plaintiff did under and as a result of the alleged agreement, but it is not alleged that Louise Coffey ever conveyed any interest in the land or any part thereof to the plaintiff. The replication shows that plaintiff is claiming as vendee under an executory ante-nuptial contract to convey land.

The question is whether the replication constitutes a departure from the complaint.

According to the replication the plaintiff is the equitable owner of the land claimed by him by virtue of being a vendee under an executory contract to convey. Through-

out the complaint the plaintiff alleges that he is the "owner." While the term "owner" is one of wide application in various connections, yet as used in the complaint in the instant case, it cannot be given such a meaning as to comprehend a vendee under a contract to convey. The context in which it appears indicates that the word is used in its ordinary sense, that is, it means the holder of the title in fee. That is the natural meaning of the term as used in the first cause of action which is for partition. It is doubtful whether a mere vendee under a contract is entitled to maintain an action in partition. *Williams v. City of St. Petersburg*, 57 Fla. 545, 48 South. 754. In the third cause of action the context indicates that the term is used as applying to the holder of the legal title, for it is sought to quiet the title of the plaintiff who is alleged to be "the owner and in possession" of the land. Possession while not necessary where the title is equitable, is essential to maintain an action to quiet title where the plaintiff is "a person claiming a purely legal title." *Consolidated Plaster Co. v. Wild*, 42 Colo. 202, 94 Pac. 285. In *McFeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388, the term "owner" was held to be properly applied to the holder of a mining claim before receiving patent therefor, but the court said:

"It is true, the term 'owner,' when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property.
* * *"

In the complaint in the instant case, the term is used alone, and imports the holder of the fee title, or legal title. It should not be given such a comprehensive meaning as to embrace any possible ownership or equitable interest that may, for the first time, be revealed in a replication. In equity, the legal rule prevails that where the allegations are equivocal they will be construed most strongly against the pleader. 16 Cyc. 237. Under the code words are to be given their ordinary and popular meaning. 31 Cyc. 80. A pleading must be construed as an entirety. 31 Cyc. 83.

Under each or all of the foregoing rules, the conclusion must be that the term "owner" as used in the complaint imports the holder of the legal title, and not of the equitable interest of a vendee under an executory contract to sell or convey. It follows that there was a fatal departure in the replication. It is clearly error to overrule the motions to strike, and the subsequent demurrers which raised the same question. *Woodward v. Woodward*, 33 Colo. 457, 81 Pac. 322.

The principal question presented by the record, and one which goes to the merits of the case, is whether the evidence is sufficient to support the decree. In this connection, counsel for defendant in error John J. Coffey says:

"The only issue tendered here is whether or not there was a contract between John J. Coffey and Louise Foster, or Louise Coffey, in which she agreed to convey to Mr. Coffey a one-half interest in said premises."

The facts leading up to the question above stated are as follows: The land in question was owned by one James S. Foster in his life time and until his death. For this property he had partially paid. He made a will, devising the land to his wife, Louise Foster, who is now Louise Coffey, wife of plaintiff. James S. Foster died in 1894, and shortly after his death his widow, now the defendant Louise Coffey, paid the balance of the purchase price of the land, in the sum of about \$4,000, out of insurance money received by her upon a policy which had been issued to her deceased husband. She became the holder of the legal title to the land, by virtue of the will. The will of James S. Foster in addition to devising the land to his wife, provided, among other things, that upon the coming of age of his minor children they should be paid a legacy of \$1,000 each. On or about November 5, 1899, Louise Foster married John J. Coffey, the plaintiff herein. On June 1, 1920, she conveyed by warranty deed to three of the children of James S. Foster, deceased, and to a daughter of a deceased child, the land involved in this suit. The grantees in such deed are made the other defendants herein. The

plaintiff seeks, in addition to quieting title or as incident thereto, to cancel the deed above mentioned to the extent that it conveys or attempts to convey his alleged one-half interest in and to the land. At the time this suit was brought the legal title to the land was vested in the defendants, and no estate in the land was held by plaintiff by virtue of any conveyance or any legal title. Plaintiff claims under the alleged ante-nuptial contract. The contract, if any, was not in writing, but was made orally.

As tending to prove the making of the contract relied on, plaintiff testified as follows:

"She did state to me that on the completion of the payments to the children of one thousand dollars and the clearing of the land, that the deed would come back to her and I, and we would have it jointly."

This testimony is interpreted by counsel for John J. Coffey as if it was to the effect that the defendant Louise Coffey agreed to convey, or to cause to be conveyed, to plaintiff a one-half interest in the land after he would pay the bequest made by the will of James S. Foster, deceased, namely, \$1,000 to each of the four children. The witness refers to a conversation that took place, if at all, more than twenty years ago. The evidence, above quoted, does not clearly show a contract to convey, but if it be assumed that it does, yet, for reasons hereinafter appearing, plaintiff is not entitled to prevail on that account alone. Mrs. Coffey in her testimony denied that she ever promised to convey any part of the "home place" to the plaintiff. She admitted, however, that after the bequests made by the will were paid, the plaintiff "wanted (her) to turn the place over," but this was not an admission of any contract to convey.

The evidence does not show that marriage was a consideration for the contract. On cross-examination the plaintiff testified that prior to the marriage he "undoubtedly" had an affection for Mrs. Foster and that this was independent of any desire to acquire her property because he

did not know she had any, except that "she had a home." Further, he testified as follows:

"Q. Now then, the matter of the ranch or what was against it had nothing to do with your affection and engaging to marry this defendant?

A. No.

"Q. Now then, at the time you were ready and willing to then and there marry Mrs. Coffey, irrespective of the ranch or anything else?

A. Yes sir."

The plaintiff's chief reliance is upon a contract wherein the consideration moving from him consisted of his paying off the bequests and making improvements on the farm.

The plaintiff testified to certain acts on his part as constituting part performance of the alleged parol contract. For example, it is shown that he constructed improvements on "the home place," but this evidence is of little importance. The farm, owned by defendant, produced income amply sufficient to pay for its own improvements, and plaintiff's part in the construction of the improvements is referable to his position as husband as readily as to his status as vendee. Plaintiff places stress upon the fact that he paid off the bequests, and thus, as he claims, performed his part of the contract. Whatever the plaintiff did in the matter of paying off bequests to the children of James S. Foster, deceased, is as consistent with the absence of the alleged contract as with its existence. Prior to the marriage of the parties, plaintiff was employed by defendant as farm hand. At the time of the marriage, plaintiff had and contributed for the use of the family no more than about two hundred dollars. Defendant, Louise Coffey, then had possession of the home place, and soon became owner thereof by virtue of the will of her former husband. It was paid for by insurance money. Thereafter accumulations of capital resulted from the joint efforts of plaintiff and defendant in conducting farming operations on the "home place," being the capital contributed solely by defendant. The parties acquired other lands from the earn-

ings of the home place, each taking a legal title to an interest therein. These other lands in turn produced revenue. Out of the income of the home place, or of these other lands, it is immaterial which, the bequests were paid. The plaintiff managed the business affairs of the family, and if he managed the affairs ably and well, it could as well have been for the purpose of sharing the accumulations resulting from the farming operations as for the purpose of complying with his part of an alleged contract. The record is such as to suggest that if plaintiff paid off the bequests, he paid them off with defendant's money.

The plaintiff seeks to enforce a parol contract to convey land. The contract would be unenforceable under the statute of frauds except for a claimed part performance. The testimony to establish the contract, under such circumstances, must be clear, positive, satisfying and convincing. *Nickerson v. Nickerson*, 127 U. S. 668; 8 Sup. Ct. 1355, 32 L. Ed. 314; *Laesch v. Morton*, 38 Colo. 171, 87 Pac. 1081, 120 Am. St. Rep. 106. Tested by this rule, the evidence in the record is not sufficient to sustain a finding that the contract relied on was in fact ever made. As said in *Boyd v. Boyd*, 68 Colo. 293, 298, 189 Pac. 608, 609:

"It is the province of a court of review to examine the entire evidence and determine whether the trial court or jury misconceived its force and effect."

The court erred in finding that there was a contract to convey, and in adjudging plaintiff to have any interest in the land in controversy.

I am authorized to state that MR. JUSTICE WHITFORD concurs in the views expressed in this dissenting opinion.

No. 10,243.

TOWN OF ENGLEWOOD v. JONES, ET AL.

Decided February 6, 1922. Rehearing denied March 6, 1922.

Action to exclude lands from a town. Decree for petitioners.

Reversed.

On Application for Supersedeas.

1. **MUNICIPAL CORPORATIONS—Disconnecting Territory.** Under the provisions of chapter 52, S. L. 1913, providing for the disconnection of outlying territory from towns and cities, where the city for more than three years had maintained a street adjoining the land sought to be disconnected and lights upon the street, a petition for disconnection should not be granted.

It was immaterial that the lights were upon the opposite side of the street from the land; that the street was at one time a county road, and that the amount of work done upon it by the city was small.

2. **Street Lights—Purpose.** The purpose of street lights is to light the streets for travel, and not adjoining lands.
3. **Street Lights—Maintenance.** The furnishing of street lighting by an independent company under contract with a city, construed to be a maintenance of such lighting by the city under the provisions of chapter 52, S. L. 1913.

*Error to the County Court of Arapahoe County, Hon.
George W. Dunn, Judge.*

Mr. R. H. BLACKMAN, Mr. SAMUEL CHUTKOW, for plaintiff in error.

Mr. F. T. JOHNSON, Mr. S. H. JOHNSON, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

JACOB C. JONES and others brought suit in the county court of Arapahoe county under chapter 52 of the Session Laws of 1913, to disconnect certain of their lands from the City of Englewood, and obtained a decree. The city now asks for a supersedeas.

The statute provides that land may be disconnected from a municipal corporation upon petition to the court showing certain facts particularly set out in the statute, and § 3 of the Act provides:

“ * * * And upon the hearing and proof of the facts set forth in said petition, it shall be determined whether said tract or tracts of land should be disconnected from such city or town, and the court shall enter an order or decree accordingly. Provided, that whenever a city or town has maintained streets, lights and other public utilities for the period of three years through or adjoining to said tract or tracts of land the owners shall not be entitled to the provisions of this act.”

Adjoining the land in question and on the south is a street, known as Hampden Avenue, which was a county road before the incorporation of the city about thirty years ago, and has been maintained by the city ever since such incorporation. Considerable work, such as scraping and gravelling, has been done on the street at the expense of the city during that time; street lights have been maintained thereon by the city, and, upon one portion, not, however, adjoining this property, considerable change in the location of the street was made and a bridge built. The city claims that these works are sufficient, under the provisions above quoted, to prevent the disconnection of the land. In this we think the city is right.

There is much doubt under the terms of said chapter 52, what considerations would be sufficient to justify the court in denying the petition, whether matters of equity or expediency are to be considered, or whether, upon proof of the facts required to be stated in the petition, the court is bound to grant the prayer unless the matters mentioned in the above proviso are made to appear. But it is not

necessary for us to consider these matters. It is clear that the city for more than three years has maintained a street and lights adjoining the tract in question. The street adjoins the land and nothing but an imaginary line separates it. The lights are on this street; therefore they also adjoin the land.

It is claimed that since the lights were on the side of the street opposite the land they were not adjoining the land; but we think that is not a fair interpretation of the word. The principal purpose of the street lights is to aid travelers on the street; if they are not on both sides it matters little which side of the street they are on; they improve the street for traveling purposes to the benefit of all travelers including dwellers on the street and they thereby enhance the value of the land. The amount of work done on the street is claimed to be very small, but that is not important; the street has been maintained.

It is claimed, under *Morrison v. Town of Lafayette*, 67 Colo. 220, 184 Pac. 301, that because the street was originally a county road the provisos of the section 3 do not apply. The court below seems to have proceeded upon that theory. That case does not support the judgment here, if we mention only the difference of the maintenance of lights in this case and none in that.

It is claimed that the lights are not beneficial to the land because they do not shed light enough nor throw it far enough to light the land itself. As we said before, that is not the purpose of street lights. They are to light travel.

It is said that the city does not maintain these lights because it has entered into a contract with a light company and pays it a yearly sum to maintain them. Clearly if the city pays for the maintenance it is maintaining them.

The judgment should be reversed and the cause remanded with directions to enter judgment for the respondents.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 9863.

AMERICAN BANK & TRUST COMPANY v. AMERICAN LIFE
INSURANCE COMPANY.

Decided March 6, 1922.

Action on life insurance policy. Judgment for plaintiff
for amount of first premium.

Affirmed.

1. APPEAL AND ERROR—*Sufficiency of Evidence.* Evidence held sufficient to prove suicide of assured in an action on a life insurance policy, that being the only question presented for review.

*Error to the District Court of the City and County of
Denver, Hon. Charles C. Butler, Judge.*

Mr. J. E. ROBINSON, for plaintiff in error.

Messrs. BARDWELL, HECOX, MCCOMB & STRONG, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS was a suit for \$10,000 on a life insurance policy. The defence was suicide. The trial was to the court. The judgment was for plaintiff for the amount of the first premium, according to the requirement of the policy in case of suicide, and plaintiff brings error.

The only point made in this court is upon the sufficiency of the evidence to prove suicide. It would serve no purpose to review it. We think the court below could have reached no other conclusion. Motive was shown and the evidence of death from intentional self-poisoning was clear.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,000.

NORRIS v. WALSH.

Decided March 6, 1922.

Action by real estate broker for commission. Judgment of dismissal.

Affirmed.

1. **BROKERS—Real Estate—Commission.** A real estate broker is not entitled to a commission until he produces a purchaser able, willing and ready to buy, and no recovery can be had where the proof fails to show that such a purchaser has been produced.

Where the agreement is that the commission is to be paid when the owner receives the entire purchase price, and no sale is consummated, an action for commission must fail.

2. **Real Estate Broker—Abstract of Title.** Claim by a real estate broker for the amount expended for an abstract of title, properly denied, where the owner of the property not only did not authorize the expenditure, but protested against it, she already having an abstract.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Mr. JAMES C. STARKWEATHER, for plaintiff in error.

Mr. ROBERT EMMET LEE, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THE action was by John C. Norris to recover a commission alleged to be due from Beesy M. Walsh, for services in procuring a purchaser for real property owned by her. At the close of plaintiff's case defendant moved a non-suit, which was granted, and a judgment of dismissal entered, which is now here for review.

The essential facts are that Norris agreed with Mrs. Walsh to find a purchaser for her land for \$9,350.00, of

which he was to have \$350.00 as commission, when the purchase price was paid. Plaintiff himself testified that such was the agreement. He procured one Ramon Solis, who contracted to buy defendant's property for the price named, and paid down \$50.00. Nothing further has been done in the premises. Mrs. Walsh never tendered a deed, nor did Solis demand one. The contract has never been completed, and no further payment has been made.

Several questions of law are discussed, but the only matter which need be considered is whether Norris has earned his commission. The theory of plaintiff is that he was to be paid his commission when he found a purchaser. The proof, however, shows that he was to receive his commission only when the seller had received her full purchase price. In no event, under the averments of his pleading, can plaintiff recover until he has found a purchaser able, willing and ready to buy. There is not a syllable of proof to show that any such purchaser has been produced, and no recovery, therefore, on the case as made, was possible.

Moreover, there is an utter absence of proof of any unwillingness upon the part of the seller to go on with the deal. Indeed, it does not appear why the transaction was not consummated, or that it may not yet be closed at any time. The record simply shows an incomplete agreement for the sale of the real estate in question, with both parties seemingly content to let the matter rest as it is, although Solis testified that Mrs. Walsh was ready at one time to complete the deal, but that he was not.

It is claimed, and the claim is not disputed, that either party to the transaction might have an action against the other to enforce the contract. Be this as it may, that fact has no bearing upon plaintiff's right to recover his commission at this time. The defendant never undertook to pay plaintiff a commission for saddling her with a law suit. Her agreement was to pay him his commission when he had sold her property, and she had been paid for it in cash the agreed purchase price of \$9,350.00, and not before.

As to plaintiff's claim for an abstract of title, the record

shows that he was a mere volunteer, and that the defendant not only did not authorize such expenditure, but protested against it, as she already had one abstract and did not wish to incur further expense in that behalf.

Manifestly, plaintiff upon his own showing, has not yet earned his commission and as the action of the trial court in directing a non-suit is plainly right, the judgment is affirmed.

MR. JUSTICE TELLER and MR. JUSTICE BURKE concur.

No. 10,004.

SMITH v. PIERCY.

Decided March 6, 1922.

Action in damages for breach of contract. Judgment for defendant.

Affirmed.

1. **ARBITRATION—Bar to Action.** An arbitration award made under authority of a duly executed agreement between the parties, bars a legal action involving the same matters.
2. **APPEAL AND ERROR—New Issue.** An issue not made by the pleadings may not properly be considered by the trial court, nor on review.

*Error to the District Court of Sedgwick County, Hon.
L. C. Stephenson, Judge.*

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Messrs. HALLIGAN, BEATTY & HALLIGAN, Messrs. ROLF-
SON & HENDRICKS, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS case arises over an award in arbitration, had for the purpose of settling a disagreement concerning the purchase and sale of land. After all of the testimony was in the court instructed a verdict for defendant, and judgment was rendered accordingly. This judgment is now here for review.

The agreement to arbitrate is as follows:

"In consideration of our signatures hereto, it is agreed as follows: Whereas, there was a certain contract issued by James Piercy to T. A. Smith, contracting for delivery Section 13-12-44. Deuel County, Nebraska, and whereas, James Piercy wishes to remove any interest T. A. Smith might have in and to said land, and whereas, T. A. Smith is willing to sell and quit claim to James Piercy all interest that he might have (if any) to James Piercy, at the sum fixed by arbitrator or arbitrators selected today, by James Piercy and T. A. Smith; if one arbitrator cannot be agreed as O. K. by both, each can select a man of his own choosing and they also are given authority to select the third arbitrator, and these are to meet at once with T. A. Smith and James Piercy and after gathering the facts each shall present, they to render a verdict, and each party hereto is bound by said verdict, James Piercy to pay whatever amount they state is right, in consideration for a quit claim deed from T. A. Smith of his interest only, as Deuel County records appear; and if there be a verdict T. A. Smith is also bound by their decision, and he is to take whatever they decide is right, whether much or little, or nothing, in consideration of immediately delivering a quit claim deed to his interests, if any, in section above described, at arbitrators order."

Under the above agreement arbitrators were duly selected, hearing was had, and plaintiff and defendant both appeared and testified personally and introduced other evidence. Upon the conclusion of the hearing the arbitrators rendered the following award:

"We do hereby find that the said T. A. Smith shall make and deliver to the said James Piercy a release of the above mentioned contract, said contract now appearing on file in the County Clerk's Records of Deuel County, Nebraska, and that the said James Piercy shall pay to the said T. A. Smith the sum of Two Hundred (\$200.00) Dollars, and that the said James Piercy and T. A. Smith shall each pay to each of the arbitrators the sum of \$5.00."

After the award Smith brought this action for damages in the sum of \$12,600.00 on account of the alleged breach of the contract of purchase and sale on which the arbitration was based. The answer set up the arbitration agreement and the award made under it as a bar to the action. The replication admitted the execution by plaintiff of the arbitration agreement, and the award, but alleged that the award was not based upon testimony, that it was in violation of the rights of plaintiff, was unfair, was not the result of deliberation, and made solely to deprive plaintiff of his rights.

The replication was in the nature of a plea in confession and avoidance of the arbitration and award as a bar to the action. There was not the slightest attempt, however, to prove that the award was unfair, or that it was not based on testimony, or that it was the result of lack of deliberation, or made solely to deprive plaintiff of his rights. Indeed, the evidence is undisputed that both parties submitted such evidence as they desired to the arbitrators, and that the award was made by a unanimous decision.

The issues being thus made up by the pleadings and the plaintiff having failed to produce evidence to establish the allegations of his replication, the defendant moved for an instructed verdict and the court so directed. Following that motion plaintiff orally, and for the first time, suggested that the arbitration agreement did not authorize the arbitrators to consider the question of damages arising out of the alleged breach of contract. That question should have been raised either by demurrer or replication, but this was not done, and the question was not and is not therefore

properly before the court. There was no such issue. There is nothing in the record or pleadings suggesting this defense. However, the arbitration agreement, as we view it, shows conclusively that all matters arising out of and involved in the original contract of purchase and sale between the parties, including the question of damages, were properly before the arbitrators for adjustment, and were in fact and law settled by their findings. In fact the only question for arbitration was the one of damages. How could there have been any other? The judgment is affirmed.

MR. JUSTICE TELLER and MR. JUSTICE BURKE concur.

No. 10,020.

STEERE, ET AL. v. McCOMB.

Decided March 6, 1922.

Action for cancellation of deeds. Judgment of dismissal.

Reversed.

1. **PRACTICE—Pleading.** A motion to separately state causes of action was granted, and plaintiffs given five days within which to elect. Held, that it was error for the court to refuse permission to file an amended complaint stating but one cause of action, which was tendered within the five days.
2. **PLEADING—Cause of Action.** A pleading which sets up but one primary right and the violation thereof, states but one cause of action.
3. **APPEAL AND ERROR—Question not Raised.** The question of whether a case for equitable relief is stated in the bill, held not properly before the court for review.

4. **NEW TRIAL—Motion.** Where the questions before the lower court were purely of law, no motion for a new trial is necessary under Supreme Court rule 8.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. CHARLES E. FRIEND, for plaintiffs in error.

Mr. R. J. BARDWELL, Mr. ROY C. HECOX, Mr. ROBERT G. STRONG, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

GRAYCE E. STEERE and her husband, Charles W. Steere, brought suit against McComb to cancel two deeds, one from her to her husband and the other from him to McComb. The property described in the deeds was a dwelling occupied by the plaintiffs in the city of Denver. It appeared from the complaint that the title to the property was in Grayce; that the interest of Charles was a homestead interest only.

The complaint alleged as grounds for the cancellation of the deeds; first, that McComb falsely represented to the plaintiffs that the plaintiff, Charles, was guilty of crime for which he was subject to prosecution; second, that he, McComb, threatened the plaintiffs that unless the conveyances were made Charles would be prosecuted for said crime and sent to the penitentiary; third, that the deed of Grayce to her husband was not acknowledged as required by the statute in case of homesteads; fourth, that both deeds were without consideration.

The defendant moved to compel the plaintiffs to separately state and number their causes of action. This motion was granted and thereupon this order was entered: "At this day it is ordered by the court that plaintiffs may have time and until five days from this date to elect herein as they shall be advised."

Within the five days plaintiffs tendered an amended com-

plaint, the substantial part of which is that the defendant "threatened, represented and said" to the plaintiff Grayce that "unless she then and there signed and delivered a deed of her property" to her husband and "unless the said Charles W. Steere, her husband, should sign and deliver a deed to said property to him the said Edgar McComb, he, the said Charles W. Steere, would go to the penitentiary;" that thereupon the plaintiffs executed such deeds and delivered them to McComb who recorded them, and that the deeds were executed and acknowledged in fear of the said threat. The amended complaint also alleges that the deed of Grayce Steere was not acknowledged by her separate and apart from her husband as required by statute.

The court declined to permit the filing; the plaintiffs stood by the amended complaint and by their right to file it and the case was dismissed. We do not know why the court below refused the tender of the amended complaint, but we infer from the briefs that it was because the court was of the opinion it was subject to the motion to separate causes of action.

The refusal was error. The plaintiffs, under the order above quoted, had a right to file an amended complaint, either alleging separate causes of action, if they could, or any other facts by which they could avoid the objection that causes were commingled in one count. Assuming that the court was right with reference to the original complaint in ordering the causes of action to be separately stated, the plaintiffs had the right to file an amended complaint stating one cause of action and omitting all others. If therefore, the amended complaint states but one cause of action there is no ground for denying the right to file it.

That it states but one cause seems clear. The plaintiffs, one of whom owns the fee and the other has a homestead interest in the property in question, have a primary right to a clear title. The existence and record of invalid deeds constitute one violation of that right. *Pomeroy Rem. & Rem. Rights* §§ 1-3, 452, 459, 518-522. See *Farmers &c. Co. v. Webber*, 70 Colo. 348, 201 Pac. 555; *Olson v. Harvey*,

68 Colo. 180, 188 Pac. 751. The court will cancel such deeds, clear the title and quiet it. Several defects in the deeds do not give rise to plural causes. This is made clear if we suppose this action had been brought as a suit to quiet title with a mere allegation of ownership followed by the statement that the defendants claimed some right, title or interest but had none. There could then have been no question that one cause only had been stated. The defendant then would have been obliged to set up his rights under the deeds and the replication would have alleged the misrepresentation, duress and illegality.

It is urged that there is one cause of action on behalf of one plaintiff and another on behalf of the other. We do not think so. The two invalid deeds constitute one cause in the subject of which and in the relief demanded by which both plaintiffs are interested. Code, §§ 10, 11, 12; *First Nat. Bank v. Hummel*, 14 Colo. 259, 274-6, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257.

It is also claimed that because it is shown in the amended complaint that Mrs. Steere did not acknowledge her deed in accordance with the law concerning homesteads, and that Steere's deed was not so acknowledged, it therefore appears that the deeds are void, so the record thereof is not a cloud upon the title and there is no occasion to cancel an instrument void on its face, and therefore there is no equity in the bill. We suppose that, if such is the case, it would be satisfactory to the plaintiffs, since a judgment upon a finding that the deeds are void would establish plaintiffs' title as well, perhaps, as a cancellation. But the question is not before us. It would arise, perhaps, on demurrer but not on the proceedings which were had.

It is not necessary to decide the question whether the error in granting the motion to separate causes in the original complaint was waived by tender of the amended complaint. That error will be immaterial when the amended complaint is filed.

The point is made, under Rule 8, that there was no motion for a new trial below, but we have recently held that

where the questions before the court below were purely of law no motion for a new trial was necessary. *Armstrong v. Gresham*, 70 Colo. 502, 202 Pac. 706.

The judgment should be reversed with directions to permit the filing of the amended complaint and for further proceedings not inconsistent herewith.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,035.

CRONIN v. HOAGE.

Decided March 6, 1922.

Action for personal injury. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—Conflicting Evidence.** A verdict based on conflicting evidence will not be disturbed on review.
2. **EVIDENCE—Complaint in Another Action.** Admission in evidence of part of a complaint filed by defendant in another action, held not error in this case.
3. **NEW TRIAL—Newly Discovered Evidence—Affidavit.** Affidavit of newly discovered evidence, in support of a motion for new trial, held insufficient.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. JOHN T. MALEY, Mr. PAUL DELANEY, for plaintiff in error.

Mr. JACOB V. SCHAETZEL, Mr. WALTER E. SCHWED, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error, appearing by his mother as next friend, recovered a judgment against the plaintiff in error in an action for personal injury.

Defendant in error, a boy of fourteen years of age, about 5:35 on a January morning, was riding across the Fourteenth street viaduct with another boy named Broadie, both on bicycles. The Broadie boy was about ten feet in advance of the plaintiff, riding in the right hand track of an automobile which had passed over the viaduct subsequent to the fall of five or six inches of snow. Plaintiff was riding in the left hand track of said vehicle. An automobile belonging to the defendant, and driven by one Kidd, ran down the plaintiff and inflicted upon him the injury of which he complains.

The testimony as to the accident consisted of that of the two boys, the only eye witnesses of the accident, of a police officer who testified as to the automobile and bicycle tracks, as did the husband of plaintiff in error, who was at the scene of the accident an hour or more after it occurred. The driver of the automobile was not a witness.

Plaintiff in error contends that the evidence is wholly insufficient to support the verdict. A reading of the record does not sustain this contention. There was evidence from which the jury might reasonably have found as they did, though there was other evidence from which a contrary inference might have been drawn. Under that condition we cannot disturb the verdict.

It is further contended that the court erred in permitting counsel for plaintiff to read from a complaint filed by the defendant in an action for the alienation of her husband's affections. The court admitted this evidence solely as

bearing upon the testimony of plaintiff in error, that she was living with her husband, and with him visited the scene of the accident on the morning it occurred. We find no error in the ruling.

It is also contended that the court erred in not granting a new trial on the ground of newly discovered evidence. Defendant filed an affidavit setting up that she had been unable to secure the attendance, at the trial, of Kidd, the driver of the automobile, and that on a new trial he would testify either in person or by deposition. The affidavit was insufficient in that it did not show diligence upon the part of the defendant in attempting to find the witness, and did not show to what the witness would testify if present, except by the unsupported statement of affiant that he would testify to certain facts. *Ward v. Atkinson*, 22 Colo. App. 134, 123 Pac. 120.

Finding no error in the record, the judgment is affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,047.

DAY v. BROYLES.

Decided March 6, 1922.

Action for cancellation of endorsement on note. Judgment of dismissal.

Affirmed.

1. **FRAUD—Endorsement of Note to Defraud Creditors—Not Cancelled.**
The endorsement made with intent to defraud creditors, will not be cancelled at the suit of the endorser.
2. **EVIDENCE—Undue Influence.** Evidence reviewed and held not to support the contention that the endorsement of a note by a

daughter was procured by undue influence of her mother, the endorsee.

Error to the District Court of Conejos County, Hon. Jesse C. Wylie, Judge.

Mr. ALBERT L. MOSES, for plaintiff in error.

Mr. CULVER A. GREEN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE plaintiff in error brought suit against the defendant in error, her mother, to cancel an endorsement made by the former to the latter of a note, payable to them jointly. The court dismissed the bill because the plaintiff's testimony showed that the endorsement was made for the purpose of defrauding her creditors.

The plaintiff's counsel does not dispute here the principle upon which the court acted, but claims that the parties in this case were not *in pari delicto*, because the plaintiff was unduly influenced by her mother to make the endorsement. The evidence, however, shows no undue influence, but, on the contrary, shows definite and independent action and intent on the part of the plaintiff. Counsel's theory is that the plaintiff was an innocent and unsophisticated girl of twenty-one years, strongly under the influence of her mother. The evidence is that she had been twice married, once divorced, had at least one child and for many years had not been on good terms with her mother and her own evidence shows her to have been keen and highly sophisticated.

Judgment affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,129.

ROBERTS v. THE PEOPLE.

Decided March 6, 1922.

Plaintiff in error was convicted of obtaining money by false pretenses.

Reversed.

1. **CRIMINAL LAW—False Pretenses—Intent.** To constitute the offense of obtaining money by false pretenses, there must be an intent to defraud.
2. **Presumption of Knowledge of the Law—Intent.** The presumption which is indulged to prevent a violator of the law from escaping a penalty on the ground of ignorance, cannot be used to supply the intent to violate another law.
3. **False Pretenses—Injury.** To justify a conviction of obtaining money by false pretenses, there must be positive evidence that the complaining party suffered loss on the transaction.

*Error to the District Court of Kit Carson County,
Hon. Arthur Cornforth, Judge.*

Mr. LOUIS VOGT, Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, Mr. SAMUEL CHUTKOW, assistant, for the people.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was convicted on a charge of obtaining money by false pretenses, and brings error.

The information alleged that the defendant had induced one Miller to purchase a pool hall and a stock of cigars, etc., by representing that he was the owner thereof, and that

there was nothing owing on it, that he thereby obtained \$166.09 of said purchaser's money.

The evidence showed that Miller purchased the pool hall and stock for \$1,300.00, and later, having learned that some of the stock had not been paid for, and that, not having complied with the law governing the sale of a merchandise stock in bulk, he had not acquired title to said goods, he paid for them to the amount above stated.

The prosecution relied, and still relies upon the evidence tending to show that defendant represented that the stock was clear, except a chattel mortgage which he agreed to pay and paid.

The defendant insists that the evidence fails to establish two necessary elements of the offense charged, viz., intent to defraud, and an actual defrauding.

Upon the question as to what defendant stated about the bills, the evidence is conflicting, and need not be considered. It is unquestioned that when the sale was negotiated, any balance due for merchandise was a simple obligation of the defendant, with no lien on the goods. When the sale was completed, without compliance with the bulk sales law, a lien or liens attached, or at least became possible.

Miller testified that because of said law he was compelled to pay said sum. It was therefore that law which caused the injury to Miller. To constitute the offense charged, there must be an intent to defraud, but if the defrauding results only from the application of the law, there could be no intent on the part of defendant unless he knew of the law and its effect in such a case. It does not appear that either party to the sale had any knowledge of the law.

It is true that everyone is presumed to know the law, but such presumption does not form a basis for a second presumption of intent to defraud. In other words, the presumption which is indulged to prevent a violator of a law from escaping a penalty on the grounds of ignorance, cannot be used to supply an intent to violate another law.

On this record it cannot be said that defendant intended to defraud Miller.

There is lacking also evidence that Miller was in fact defrauded. The record shows the amount paid for the pool-room, but there is nothing to show how much the thing sold was worth. To justify a conviction there must be positive evidence that Miller suffered loss on the transaction.

For these reasons the judgment is reversed.

MR. JUSTICE ALLEN and MR. JUSTICE BAILEY concur.

No. 10,267.

THOMAS, ADMINISTRATOR v. JOHNSON.

Decided March 6, 1922.

Action for allowance of claim against an estate. Judgment for claimant.

Affirmed.

On Application for Supersedeas.

1. EVIDENCE—*Written Instrument—Delivery.* A deceased person left a writing acknowledging the receipt of a sum of money for safe keeping; held, that on the hearing of a claim against the estate for this fund, the instrument, although never delivered, was competent evidence.
2. *Withdrawal of Testimony—Harmless Error.* It is erroneous to allow a party, against the objection of his adversary, to withdraw evidence when he finds it unfavorable; but such error is harmless where no prejudice results to the complaining party.

Error to the District Court of the City and County of Denver, Hon. George H. Bradfield, Judge.

MR. J. I. HOLLINGSWORTH, for plaintiff in error.

Messrs. GOUDY & GOUDY, Mr. FRANK L. ROSS, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE case is here on error to the Denver district court upon a judgment in favor of defendant in error allowing his claim against the estate of Christine Nelson, of which Thomas was administrator.

Johnson and the decedent lived together as man and wife. The claimant was offered as a witness in his own behalf. The administrator objected that he was incompetent, under § 7217, R. S. 1908, but the objection was overruled. Upon cross examination he testified that after her death he found, among her effects on the chiffonier in the house, Exhibit C, which was as follows:

“Denver, Colorado, February 25, 1916.

I have for safe keeping belonging to M. L. Johnson Five hundred \$500.00 May Nelson in case anything happens to me you give that to Mr. Johnson.

Christina Nelson.”

That he gave this paper and the rest of her effects to Mr. Thomas, the administrator, who afterwards returned it to him.

When the claimant rested the administrator moved for a directed verdict, claiming that the claimant's own testimony proved there was no delivery of the above instrument. Regardless of the question of delivery, the motion was properly overruled. The ultimate question for the jury was not whether the writing was delivered, though they might consider that question, but whether the decedent held Johnson's money. There was other evidence of the genuineness of her signature, and the paper, even if never delivered, was competent evidence tending to show that she held the money. There could, therefore, be no directed verdict for the estate.

Before the said motion was overruled, the administrator

withdrew his objection to the competency of the claimant; thereupon the court, against objection, permitted the latter to withdraw the testimony he had given in his own behalf and the court instructed the jury accordingly. This is the principal error relied on for reversal. We think it erroneous to allow a party, against the objection of his adversary, to withdraw even incompetent evidence when he finds it unfavorable to himself, but in this case there was no prejudice. The administrator might himself have called the witness and proved the facts he relied on to show there was no delivery; indeed the court suggested it, but he did not do so. He did, however, prove those facts by another witness and they were uncontradicted. This cured the error. *B. & M. R. R. Co. v. Burch*, 17 Colo. App. 491, 498-9, 69 Pac. 6.

Supersedeas denied and judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,275.

KELLIHER v. THE PEOPLE.

Decided March 6, 1922.

Plaintiff in error was convicted of a criminal charge relating to intoxicating liquors.

Reversed.

1. WORDS AND PHRASES—"Suit." The word "suit" held to mean a criminal prosecution as well as a civil proceeding.
2. STATUTORY CONSTRUCTION—*Service of Process—Sheriff Disqualified.* Section 1299, R. S. 1908, relating to disqualification of the sheriff and performance of his duties by the coroner, held to apply to criminal as well as civil proceedings.

*Error to the County Court of Otero County, Hon. E. C.
Glenn, Judge.*

Mr. JOHN A. MARTIN, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, Mr. SAMUEL CHUTKOW, assistant, for the people.

MR. JUSTICE ALLEN delivered the opinion of the court.

THE plaintiff was informed against, tried and convicted in the county court on a criminal charge relating to intoxicating liquors. Prior to the trial, and before a jury was summoned, he filed an affidavit to disqualify the sheriff from acting in the case, and also moved to the same effect. The motion was overruled. The question raised by the motion was subsequently raised in other ways. There is but one question presented, and that is, whether the statute relied on by the accused is applicable in criminal cases.

The affidavit was filed in reliance upon that statute, which is section 1299 R. S. 1908. That section, so far as material, reads as follows:

"Whenever any party * * * shall make and file with the clerk of the proper court an affidavit stating that he believes that the sheriff of such county will not by reason of either partiality, prejudice, consanguinity or interest, faithfully perform his duties in any suit commenced * * * in said court, the clerk shall direct the original or other process in such suit to the coroner, who shall execute the same in like manner as the sheriff might or ought to have done."

This statute has been held mandatory. *Litch v. People*, 19 Colo. App. 433, 75 Pac. 1083. It is not disputed that the affidavit involved in the instant case was sufficient, if the statute is applicable. The theory of the trial court apparently was, and the contention of the Attorney General now is, that a defendant in a criminal action cannot avail himself of the provisions of this statute; in other words, that the statute has no application in criminal cases. The

theory and the contention thus stated is based entirely on the fact that the statute uses the term "suit." It is argued that the word in question does not, and was not intended to, comprehend a criminal proceeding.

In *Commonwealth v. Moore*, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128, the court said:

"The word 'suit' has, in practice, been considered as meaning criminal prosecutions, as well as civil proceedings."

This expression was made in connection with a reference to a statute relating to juries, and particularly to a section thereof providing that upon motion of either party in a "suit", the court is required to examine the person called as juror with reference to his interest, prejudice, etc.

The statute involved in the instant case is a section of an act entitled "An Act Relating to Counties and County Officers," as found in the General Laws of 1861, p. 84. The act includes provisions relating to the duties of sheriffs and coroners, irrespective of whether such duties pertain to criminal or to civil cases. Construing the section now being considered, section 1299 R. S. 1908, in connection with the entire act and its purview, there appears no legislative intent, in that section, to refer only to duties in civil actions and not in criminal proceedings. In the section immediately preceding (section 1298 R. S. 1908), the legislature used the term "the case," and appeared to refer to the "affidavit * * * filed as provided in the succeeding section," in the case, or any case.

In *Saunders v. People*, 63 Colo. 241, 165 Pac. 781, section 3702 R. S. 1908, which provides for the taxation of a jury fee "as part of the costs of suit in each cause tried by a jury," was held to be applicable in criminal cases. It will be observed that the statute there used the term "suit" and "cause."

The statute involved in the instant case is not one relating exclusively to either criminal or civil procedure, but is one simply relating to duties of the sheriff and coroner, and the legislative intent was to substitute the coroner for the

sheriff in *any* case, not merely in a civil action, where the affidavit is filed.

In our opinion, the statute is applicable to criminal actions. It is conceded, in effect, that reversible error was committed if the statute is applicable. The judgment is reversed and the cause remanded for further proceedings in harmony with the conclusion above announced.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE BAILEY concur.

No. 9783.

BURT v. THE ROCKY MOUNTAIN FUEL COMPANY.

Decided May 2, 1921. No change in opinion on rehearing April 3, 1922.

Action for damages for subsidence of lot caused by coal mining. Plaintiff nonsuited.

Reversed.

1. MINES AND MINING—*Duty to Owner of Surface Rights.* Unless there be a contract, express or implied, releasing him from the duty, the owner of coal only, when he mines it, must leave sufficient support to sustain the surface above.
2. DEEDS—*Grantor Without Interest—Grantee.* The grantee takes nothing by a deed, and is not bound by reservations therein, when the grantor had no right, title or interest in the property described.
3. REAL PROPERTY—*Conveyance—Omission of Reservation.* Where a conveyance of town property omits one of the reservations contained in the original plat and dedication, the omission must be construed to have been intentional.
4. EVIDENCE—*Nonsuit.* Evidence reviewed and held sufficient to go to the jury, and to require a defense.

Error to the District Court of Boulder County, Hon. George H. Bradfield, Judge.

Mr. O. A. JOHNSON, for plaintiff in error.

Mr. JESSE G. NORTHCUTT, Messrs. DANA, BLOUNT & SILVERSTEIN, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

MARY BURT brought suit against The Rocky Mountain Fuel Company for damages for the subsidence of her lot, (lot 7, block 7, Excelsior Place,) in Lafayette, Boulder County, which she claimed was caused by the underground mining of defendant. She was non-suited. The company makes three principal points to justify the non-suit: 1. That the contract under which she acquired her lot contains a reservation of the right to mine on the property and a waiver of damage to be caused thereby; 2. That the dedication of the plat of Excelsior Place reserves the right to mine without liability for damage on account thereof, and subsequent purchasers are bound by such reservation; 3. That there is no evidence of any mining done by the Rocky Mountain Fuel Company under the lot or near enough to cause its sinkage.

In February, 1893, The United Coal Company filed the plat of Excelsior Place and by the dedication declared that it had subdivided the same as shown by the plat and granted to the public a perpetual right of way over the streets, etc.,

"Saving, excepting and reserving to The United Coal Company, its heirs and assigns forever, the right to mine or take out any coal, or other mineral, oil or gas, that may be found beneath the surface of said premises. The intention being to convey the surface ground only. And a farther exception and reservation is made that The United Coal Company, its heirs and assigns shall not be liable or responsible for damages or compensation on account of the

removal of surface support in working the mine beneath. It is hereby stipulated that no spirituous, vinous or malt liquors shall ever be sold or given away as a beverage on the premises herein described. * * *."

In July, 1893, said company gave plaintiff an "agreement of purchase," so called, whereby, in consideration of \$100, it agreed "to sell" to her the lot in question "according to the recorded plat thereof, subject to the reservation of coal and other mineral. Also clauses against selling liquor." She paid the \$100, and has been in possession ever since.

February 16, 1907, Thomas Burt, plaintiff's husband, divorced about that time, gave her a quitclaim deed of the lot,—“subject to the mineral reservations of all coal beneath the surface, damages for mining coal and the clause against the selling of any liquor as contained in the original agreement from The United Coal Company.”

November 21, 1917, The Northern Coal and Coke Company, whose title does not appear, gave to plaintiff a quitclaim deed of the lot in question.

It is conceded that unless there be contract, express or implied, the owner of the coal only, when he removes it, must leave support enough to hold up the surface.

The deeds from the Northern Coal and Coke Company and Thomas Burt need not be considered, because the grantors do not appear by the record to have had any right, title or interest in the lot and plaintiff took nothing by either.

The first point is not well taken. The agreement of purchase expressly refers to the reservations of coal and other mineral and the clauses as to liquor but makes no reference to the immunity from liability for damages caused by mining. The only possible construction to be put upon this is intentional omission.

The second point, then, is already answered. Even if, ordinarily, a reservation of immunity in the dedication of a plat, without more, would be effectual against a subsequent purchaser, a point we do not decide, it cannot be so when such purchaser's title is expressly made subject to

but part of several reservations, because such expression excludes the remainder.

As to the third point: True, there is no direct evidence that the company mined under or near the lot or even within 800 feet of it, but the evidence is that the plaintiff's lot and other land adjacent and near it, sank, that there was, at some time or other, mining, followed by pulling of stumps and other supports, very nearly under the lot. There was here at least enough to go to the jury on the question as to what caused the subsidence. Land does not sink without cause and but one possible cause appears. As to who caused it: It appears that none but defendant The Rocky Mountain Fuel Company did any mining there or near there during the period of sinkage or for some years before, and that subsidence usually occurs within thirty days or so after the removal of support. There is no evidence that sinkage from such cause is ever delayed for as much as a year. This was enough to go to the jury and to put the company on its defense.

Reversed and new trial granted.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT.

No. 10,039.

NESTEROFF v. THE PEOPLE.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Plaintiff in error was convicted of murder.

Affirmed.

1. CRIMINAL LAW—*Order for Defendant's Witnesses at the Expense of the People.* The issuance of an order by the court that the

defendant's witnesses in a criminal case may be procured at the expense of the people, under the provisions of section 2005, R. S. 1908, is discretionary, and the discretion was not abused in the case under consideration.

2. **APPEAL AND ERROR—Instructions.** Error assigned on instructions will not be considered on review, where no objection was made nor exception saved to the giving of the instruction of which complaint is made.
3. **CRIMINAL LAW—Interpreter.** The appointment of an interpreter for witnesses in a criminal case who speak the English language imperfectly, is within the discretion of the court, and in this case no abuse of that discretion is shown.
4. **Conduct of District Attorney.** Questions and comments of the district attorney on the trial, of which complaint is made, reviewed and held to have been justified.
5. **APPEAL AND ERROR—Conflicting Evidence.** Findings of fact by a jury on conflicting evidence will not be disturbed on review.

Error to the District Court of Routt County, Hon. Francis E. Bouck, Judge.

Mr. JOSEPH K. BOZARD, Mr. ARTHUR R. MORRISON, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error, (hereinafter referred to as defendant) was convicted of murder in the first degree. The jury fixed the penalty at life imprisonment and sentence was pronounced accordingly. To review that judgment defendant sues out this writ. Of his twenty-seven assignments the following alleged errors are argued: 1. The refusal of the court to summon defendant's witness Louis Evanoff at the expense of the people under section 2005 R. S. 1908. 2. The giving of a portion of instruction No. 1. 3. The refusal of the court to appoint an interpreter. 4. Conduct of the district attorney in asking insinuating questions and

making improper comments in argument. 5. The insufficiency of the evidence to support the verdict.

1. The affidavit required by said section 2005 R. S. 1908, was made on behalf of defendant as to eight witnesses. Seven were allowed by the court. One of those was not used by the defense. Subpoena for Louis Evanoff was refused. It was contended that deceased, in conversation with this witness, had threatened defendant. Defendant himself when on the stand was permitted by the court to recite Louis Evanoff's report to him of this alleged threat. The matter thus went before the jury with no opportunity to the people to test it by cross-examination. Furthermore it appears to have been immaterial. The position of the defense was that the killing was accidental and the court so instructed the jury without objection. Counsel for defendant admit that the issuance of the order as to this witness rested in the sound discretion of the court. The record clearly shows that discretion to have been properly exercised.

2. The portion of instruction No. 1 complained of was clearly not prejudicial, and, in view of the fact that no objection was made and no exception saved to this, or any other instruction, we deem it unnecessary to give it further consideration. *Tollifson, et al. v. People*, 49 Colo. 219, 233, 112 Pac. 794; *Zall Jewelry Co., et al. v. Stoddard, et al.*, 68 Colo. 395, 397, 190 Pac. 506.

3. A number of the witnesses were Bulgarians who spoke English imperfectly. Questions and answers were frequently repeated and explained. Jurors, when in doubt, were encouraged to interrogate and did so freely. The appointment of an interpreter was several times suggested. No objection was made or exception saved to the failure of the court to so act. The jurors were asked if they understood the witnesses and answered in the affirmative. The appointment was discretionary and no abuse is shown. *People v. Morine*, 138 Cal. 626, 72 Pac. 166; *State v. Shea*, 78 Wash. 342, 139 Pac. 203; *State v. Inich*, 55 Mont. 1, 173 Pac. 230, 234,

4. Certain questions asked by the district attorney assumed an attempt to bribe or intimidate people's witness Cheoskoroff. The latter himself testified that these acts had occurred. Defendant's witness Kabaroff demonstrated his partisanship. He admitted that defendant owed him money. The district attorney inquired if this fact influenced him. The question was clearly proper. In argument the district attorney referred to "threats and intimidations" employed by "friends of defendant" to prevent the People's witness Cheoskoroff from testifying. In view of the latter's testimony this comment was justified.

5. Defendant was charged with the murder of Pete Evanoff on July 10, 1920. A quarrel had arisen between them concerning a shovel. The people's witnesses say that a fight ensued in which defendant was worsted; that he went to his house near by and within a few minutes returned with a single barrel shotgun, cursing deceased, calling him names, and saying, "I show you now, I will kill you"; that a struggle took place both men at one time having hold of the gun; that defendant "jerked that shotgun and the shot go off"; that deceased "fell down on the ground"; that defendant said to a bystander, "Don't talk to anybody"; that the fatal shot was fired within three or four minutes after defendant returned with his gun; that after he fell deceased exclaimed "He kill me"; that deceased "was shot right here behind the hip", "a couple of inches below the pelvic bone"; and that the thigh bone was fractured and the shot went up into the abdomen.

Defendant testified that just prior to the fight deceased had made to several other persons threats to kill him. None of the others so testified. Defendant further says that after the fight he went into his house, changed his clothes, did some housework, went outside again and found that the gathering had dispersed and no person was in sight; that he returned to his house, worked there a short time longer, then took his gun and started out to hunt for a rattlesnake concerning which there had been some notoriety in the community; that while investigating a disturb-

ance amongst his hogs he heard footsteps behind him but did not look round until they were very close; that he thereupon discovered deceased very close to him with a club in his hands; that deceased said, "I am going to knock your brain out" and struck him with the club; that a scuffle ensued for the possession of the gun; that some one came behind defendant and grabbed hold of the gun and while being so held it went off; that turning round he discovered this person to be one Popoff (since deceased); that after the explosion Evanoff cried out, "He killed me."

There is no evidence that at the time of the fight or the shooting deceased had a weapon of any kind, unless it be the stick or club testified to by defendant. The correctness of many of the court's rulings on the admission or rejection of evidence is argued at some length by counsel for defendant. As to those of moment the record discloses no objections made or exceptions saved.

Enough only of this evidence has been recited to indicate clearly its conflicting character. The rule in such cases is well established. It is peculiarly applicable here. Aside from the conflict thus disclosed by the record several of these witnesses illustrated their testimony by enacting before the jury the scene which they had witnessed, showing relatively where the participants stood, how the gun was held, its position and the position of the contestants when the fatal shot was fired—all of which matters, doubtless perfectly clear to judge and jurors, cannot be made so here. When we add to these the element of broken English, often easily comprehended and interpreted when the speaker is before us, but somewhat obscure on the printed page, it would seem that if there was ever a case where every reason existed for the rule that a verdict based upon conflicting evidence will not be disturbed it is the case before us. *Hallack, et al. v. Stockdale, et al.*, 14 Colo. 198, 23 Pac. 340; *Mow, et al. v. People*, 31 Colo. 351, 358, 72 Pac. 1069.

The judgment is affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT not participating.

No. 9992.

LOCKARD, ET AL. v. THE PEOPLE, EX REL.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Quo warranto proceeding to test the validity of the organization of an irrigation district. Demurrer to answer sustained.

Reversed.

1. PLEADING—*Quo Warranto—Answer*. Allegations of an answer in an action to test the validity of the organization of an irrigation district reviewed, and held to state a defense.

*Error to the District Court of Garfield County, Hon.
John T. Shumate, Judge.*

Mr. JOHN R. SMITH, Mr. L. E. KENWORTHY, for plaintiffs in error.

Mr. J. G. SCHWEIGERT, Mr. H. A. HICKS, Mr. JOHN L. SCHWEIGERT, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS action was an information in the nature of *quo warranto* to try the validity of the organization of the Divide Irrigation District in Garfield county. Respondents demurred, their demurrer was sustained, the case was reversed by the Court of Appeals, and that decision was affirmed by this court. *Lockard et al. v. People*, 65 Colo. 558,

178 Pac. 565. The respondents then answered, setting up the proceedings for the organization of the district. A demurrer to this answer was sustained, and the case is here upon the question whether that decision was right.

Rev. Stats. 1908, § 3441, requires the publication of a petition to the county commissioners, "together with a notice signed by the committee of said petitioners selected by the petition for that purpose, giving the time and place of the presentation of the same to said board of county commissioners."

First. It is claimed that the notice was insufficient because the petition appointed no committee for the purpose of *giving the notice*, but only "to publish this petition and present the same to the board of county commissioners."

We think it must be inferred that the committee was selected to give the notice since the notice and petition are required to be published together. It is unreasonable to suppose they were authorized to make an insufficient publication, but rather to do all things necessary to make it complete.

Second. It is said that the notice is addressed to no one and from its terms, there being no description of any property, no person could be advised as to whether or not his property rights in lands were affected. But the notice was published in connection with the petition which described the lands fully.

Third. It is said the notice does not purport to be given by any committee authorized to give notice or to publish it. The notice does purport to be given by a committee duly authorized to give it and publish it.

Fourth. It is said that the notice is not signed by its signers in any official capacity as a committee or at all. Such is not the case. It says that "The undersigned as the committee duly authorized will present" etc. This shows the capacity in which the signers were acting, and it is not material in what part of the notice this appears.

Fifth. It is said the petition was published separately from the notice and should have been published with it,

and that the notice shows this on its face. It is true that the notice is capable of that construction. It states that the petition is "now being published in full in this paper * * * separately from this notice, and to which reference is hereby made." This statement, however, may be construed to mean that the petition and notice were separate instruments and not that they were published in separate parts of the paper. The answer itself says that the petition was published "in connection with" the notice. This is a statement of fact with which the notice construed as above agrees and we ought therefore so to construe it.

Our conclusion is that the answer was good and that the demurrer should have been overruled.

Judgment reversed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,001.

THE LONGMONT FARMERS' MILLING & ELEVATOR CO. v.
MULVANEY, ET AL.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Action for conversion of mortgaged property. Judgment for plaintiffs.

Affirmed.

1. **APPEAL AND ERROR—*Fact Findings.*** In an action for the conversion of mortgaged property, the question of whether or not the mortgagee consented to the sale, is one of fact, upon which the finding of the trial court, supported by evidence, will not be disturbed on review.

2. **PERSONAL PROPERTY—Conversion—Demand.** In an action for the conversion of personal property, a demand is not a necessary prerequisite, where the surrounding facts and circumstances show that it would have been unavailing.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Mr. JACOB S. SCHEY, Mr. JOHN F. REYNES, for plaintiff in error.

Mr. RUDOLPH JOHNSON, Messrs. GOSS, KEMP & HUTCHINSON, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANTS in error were plaintiffs and plaintiff in error was defendant in the trial court and they are herein-after so designated. Plaintiffs brought this action to recover damages in the sum of \$6919.02 alleged to be due them for certain wheat sold by one Smith to defendant and upon which plaintiffs held a mortgage. That such a mortgage was executed, recorded and in force, and that the wheat was purchased by defendant from Smith is undisputed. It is set out in the answer that plaintiffs knew of the sale and the progress of delivery and payment, that they failed to notify defendant of their claims, that they accepted a part of the purchase price, that they openly held Smith out as the owner, and consented to the transaction. All this is denied by the replication.

By agreement of the parties a jury was waived and the cause was tried to the court, which found generally for plaintiffs and entered judgment in their favor for the sum of \$3246.77. To review that judgment defendant brings error.

BURKE, J., after stating the facts as above.

Briefly stated defendant's position is: 1. That plaintiffs consented to the sale. 2. That under the facts and circumstances of this case demand was necessary and none was made.

That this is an action in conversion, that it can not lie if there was consent to the sale or ratification of the same, that such consent waives the lien, that consent may be implied from the circumstances surrounding the transaction, that the purchaser can not be bound by any secret agreement between the mortgagor and the mortgagee, and that the receipt of proceeds with the knowledge of their source is evidence of acquiescence in the sale, may all be admitted, and the authorities cited in support of them require no examination.

1. Whether plaintiffs consented to this sale is a question of fact. If there be evidence to support the judgment it can not be disturbed. *Hallack, et al. v. Stockdale, et al.*, 14 Colo. 198, 23 Pac. 340; *Ziegler v. Ilfeld*, 52 Colo. 275, 278, 122 Pac. 56, Ann. Cas. 1913D, 583.

We are of the opinion that a minute examination and detailed discussion of the evidence is unnecessary and would be unprofitable. We have examined the entire record with care and are fully satisfied that it supports the conclusion of the trial court that defendant did not sustain the burden imposed upon it by law of proving by a preponderance of evidence, estoppel, consent or ratification. That there are some conflicts in the evidence can not be disputed but these present no question for our consideration.

2. The sale in question was an absolute one. Defendant's possession was wrongful, and, the wheat having been received and mingled with other grain so that a demand would have been unavailing, and this action being contested on its merits, no demand was requisite. *Ilfeld v. Ziegler*, 40 Colo. 401, 409, 91 Pac. 825; *Klug v. Munce*, 40 Colo. 276, 280, 90 Pac. 603; *Ellison v. Tuckerman*, 24 Colo. App. 322, 334, 134 Pac. 163.

Finding no reversible error in this record the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER not participating.

No. 10,010.

WISHERED v. NOONEN.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Action in damages for breach of contract for purchase and sale of land. Judgment of dismissal.

Reversed.

1. **CONTRACT—Waiver.** Waiver is a question of fact to be established by proof. It may be shown by express declarations; or by the party so neglecting to act as to induce a belief that there is an intention to waive; or by a course of acts and conduct which amounts to an estoppel.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. N. WALTER DIXON, Mr. S. R. ROBERTSON, for plaintiff in error.

Messrs. HENRY & FERGUSON, Mr. J. E. ROBINSON, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFF, Wishered, made a contract with defendant, Noonan, for the purchase of certain land for \$55,040.00, of which \$4,360.00 was paid down, the balance to be paid in instalments. Wishered went into possession of the land, and so continued from the date of the contract, December 6, 1915, until November 20, 1916. During this period he paid on the purchase price and interest an additional \$3,001.60, making a total payment of \$7,361.60.

On November 20th, 1916, the contract was abandoned by mutual consent, and in consideration of the payments theretofore made, defendant gave Wishered a new contract or option to purchase the land, at a price reduced from the original sum fixed to the extent of the payments Wishered

had already made. The amount, which was to be paid in instalments under the option contract was \$50,062.92. The first instalment became due on May 1, 1917. The new contract had the following provisions:

"Time shall be the essence of this proposal, and if you fail to make the payment falling due on or before the 1st day of May, 1917, or any subsequent payments, as and when the same shall fall due as herein provided, or shall fail to pay the taxes against the said premises as and when the same shall become due and payable, then this writing shall, at the option of the undersigned, become absolutely null and void and of no force and effect, and any payments which you may have theretofore made shall belong to me as liquidated and agreed damages and as compensation for the use and occupancy of said premises."

Plaintiff remained in possession under this option long after the first day of May, 1917, when the instalment of \$8,782.90 fell due. He failed to make the payment then and presently thereafter defendant demanded the same, or at least \$2,000.00 of it. Plaintiff replied that he could not then pay the \$2,000.00 but would make arrangements to do so soon. Noonan responded that it would not be necessary for Wishered to raise the money, as he, Wishered, would be able to sell the land shortly, and could then make payment. It appears that thereafter, and until July 5, 1917, defendant frequently consulted with plaintiff in regard to the sale of the land, was cognizant of plaintiff having negotiations with prospective purchasers, and made no further demand for payment of the overdue instalment, but allowed and encouraged plaintiff to continue his efforts to effect a sale.

Notwithstanding this situation, on July 7, 1917, defendant, without notice to or demand upon plaintiff, sold the land covered by the option to another. Plaintiff brought this action for damages in the sum of \$15,000.00. Defendant filed a general demurrer, which was sustained. Plaintiff elected to stand upon his case as made, and a judg-

ment of dismissal was entered. It is that judgment which is now here for review.

There is no dispute of fact. The only question is whether defendant by his words and acts waived his right to terminate the option at the time the first instalment was due. As to the manner in which waiver may be effected it is said in 40 Cyc. 267 :

“Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive. Proof of express words is not necessary, but the waiver may be shown by circumstances, or by a course of acts and conduct which amounts to an estoppel.”

It is contended by defendant in error that the option in question, having expired by its terms because of the failure of plaintiff to make payments as agreed, he, the defendant, had a right to declare it forfeited at any time, and retain the money paid. Ordinarily that might be the case, but under the facts alleged in the complaint, the truth of which is admitted by the demurrer, defendant in legal effect extended the option until such time as plaintiff either sold the land, or made the past due payment, or until he had formally given notice of his intention within a reasonable time limit to declare the option at an end. Upon the facts and circumstances as set out in the complaint, the action of the court in sustaining the demurrer to it, and in entering a judgment of dismissal, were both erroneous. The judgment is therefore reversed, and the cause remanded, for further proceedings in harmony with the views herein expressed.

MR. JUSTICE TELLER and MR. JUSTICE BURKE concur.

No. 10,057.

SOULE, ET AL. v. KUNKLE, ET AL.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Action to cancel corporate stock issued to defendants.
Judgment of dismissal.

Affirmed.

1. **APPEAL AND ERROR—Findings.** A general finding for defendants in an action for the cancellation of corporate stock on the ground that it was procured by fraud and without adequate consideration, is conclusive on review.
2. **CORPORATIONS—Cancellation of Stock.** A corporation cannot maintain an action for cancellation of its capital stock issued without fraud, for mere inadequacy of consideration which it had accepted; nor can a shareholder in its behalf.
3. **EQUITY—Maxim.** He who comes into equity must come with clean hands, applied.
4. **TRIAL—Remarks of Judge—Findings.** Remarks of the court during a trial are not findings, properly so called.
5. **APPEAL AND ERROR—Law of the Case—Re-trial.** On re-trial of a cause which has been to the supreme court where the question of consideration for transfer of stock of a corporation was passed upon the determination is decisive, the evidence being substantially the same as on the first trial.

Error to the District Court of Mesa County, Hon. Thomas J. Black, Judge.

Mr. M. D. VINCENT, Mr. C. T. VINCENT, for plaintiffs in error.

Messrs. WALKER & HICKMAN, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE court below dismissed the bill and plaintiffs bring

error. The facts may be found in *Kunkle v. Soule*, 68 Colo. 524, 190 Pac. 536. A judgment for plaintiffs having been there reversed, they amended their complaint so as to set up matters of fraud on the part of Kunkle as well as want of consideration for the issue to him of fifty-one per cent, 51,000 shares, of the capital stock of The National Radium Products Company, and, upon retrial, the court, with no special finding, found the issues generally for defendant.

Upon the question of fraud the finding settles the matter and we think it does also upon the question of consideration.

With the element of fraud eliminated there seems nothing left. The corporation could not maintain the action for mere inadequacy of a consideration which, without fraud, it had accepted; *Old Dominion Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Kunkle v. Soule*, *supra*; nor, therefore, could a shareholder in its behalf; but this action is by shareholders on behalf of the company and so cannot be maintained for inadequacy of consideration. It would seem, too, under the evidence, that there is no equity in their position, because the cancellation of Kunkle's stock would enure to the benefit of those stockholders who aided in the alleged unlawful transaction as well as those who are innocent. *Old Dominion Co. v. Lewisohn*, *supra*.

In parts of the brief, it is true, the plaintiffs in error argue and cite authorities as if the suit were on their own account and based on the sale to the public and to them of stock which had been issued full paid for an inadequate consideration, but, if that were so, they should have alleged and proved that they were innocent purchasers, which they have not done; *Old Dominion Co. v. Lewisohn*, *supra*; so even if the bill were on their own behalf it was rightly dismissed.

They have alleged, moreover, that they acquired their stock upon an original issue thereof by the company to them, and we should infer, from some of the evidence and from allegations in the answer, that they paid fifty per cent

less than par, though it was, we may presume, issued to them full paid. If this is true, their stock, upon which alone they have standing to maintain their suit, whether on their own behalf or the company's is tainted with the same pollution as that which they charge against Kunkle's and therefore they are not in court with clean hands.

Again, the answer alleges that all the stock was in reality issued to Kunkle in consideration of the assignment of processes etc., by him, and that forty-nine per cent was then donated to the company by him as treasury stock and was the source of the holdings of the plaintiffs; and defendant argues that therefore if his stock is defective theirs is.

The argument is sound if the allegations are true, *Old Dominion Co. v. Lewisohn*, 210 U. S. 206, 215, and we must consider them true because the issues are found generally for defendant.

Plaintiffs in error are right that we did not by our former decision, intend to cut off plaintiff's right to show want of consideration at the second trial if he could, and the court below did not do so. The trial judge said, to be sure, in the course of some remarks, that he regarded our former decision as eliminating the question of consideration, but that was not a finding, *Jones v. Boyer*, 68 Colo. 568, 193 Pac. 492, and we must suppose that it was made with reference to the evidence before him. The evidence as to consideration was, substantially, the same as at the first trial, and, in contemplation of that situation he was right in saying that our former opinion was decisive. In no view of the case then, could a decree for plaintiffs have been supported.

There are twenty-two assignments of error in the admission and exclusion of evidence. We have examined both the abstract and record upon these points and can find no error in any of them, which in view of what has been said above, could have affected the result.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER not participating.

No. 10,259.

THE WALLACE PLUMBING CO. v. DILLON.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Action to recover compensation for labor and materials furnished. Judgment for plaintiff.

Reversed.

On Application for Supersedeas.

1. **PLEADING—Complaint—Reply—Departure.** Where a complaint was for recovery on *quantum meruit*, and the replication admitted that a part of the material furnished and work performed, was under the terms of an express contract set out in the answer, there was no departure.
2. **EVIDENCE—Contract.** The plaintiff may introduce in evidence an express contract under a *quantum meruit* count.
3. **PARTIES—Trade Name—Affidavit.** An individual doing business under a trade name, must file an affidavit in compliance with the provisions of section 4778, R. S. 1908, before he can prosecute a suit for the collection of a debt; but it is not necessary that the affidavit be recorded.

Affidavit in the instant case held insufficient.

4. **APPEAL AND ERROR—New Trial—Issue.** Where a cause is reversed on the ground that the plaintiff, an individual doing business under a trade name, has failed to file the affidavit required by section 4778, R. S. 1908, the only issue on a new trial is that of compliance with the statute, and the affidavit may be filed at any time prior to the new trial.

Error to the District Court of Fremont County, Hon. James L. Cooper, Judge.

Mr. A. L. TAYLOR, for plaintiff in error.

Mr. E. H. STINEMEYER, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action to recover compensation for work, labor and materials. There was a verdict and judgment for plaintiff. Defendant has sued out a writ of error, and the cause is before us on his application for a supersedeas.

The plaintiff in error, defendant below, contends that plaintiff's replication was a departure from the complaint, and for that reason ought to have been stricken upon his motion. The complaint is for recovery on a *quantum meruit* and alleges, in substance, that plaintiff performed services and furnished material upon a building, at the special instance and request of defendant, and that the services and material were reasonably worth the sum of \$106.85. The replication, in so far as it is claimed that it is a departure, admits that a part of the work performed and material furnished was performed and furnished under an express contract, as pleaded in the answer.

There was no departure. As said in *Ford v. Rockwell*, 2 Colo. 376:

"When the contract has been performed the plaintiff may recover * * * the price of the services under an *indebitatus assumpsit*, * * *."

See also 5 C. J. 1386; 28 R. C. L. 691, sec. 27, note 18. A question regarding departure, identical with that here presented, was disposed of in *Northwestern Marble & Tile Co. v. Swenson*, 139 Minn. 365, 166 N. W. 406. There the complaint, as in the instant case, was upon a *quantum meruit*, the answer alleged an express contract, which the reply admitted. Held, no departure.

It is next contended that the court erred in permitting plaintiff to introduce in evidence the express contract relating to services. There is no merit in this contention,

and it may be disposed of in the language found in *Harvey v. D. & R. G. R. Co.*, 44 Colo. 258, 265, 99 Pac. 31, 33, 130 Am. St. Rep. 120, where this court said:

"The second cause of action stated in the complaint, was for services rendered and appliances and materials furnished to defendant at its special instance and request, and was broad enough to admit evidence of either an express or an implied contract."

In *Meyer v. Saterbak*, 128 Minn. 304, 150 N. W. 901, the court said that "the sensible and correct rule" is that a plaintiff may introduce an express contract under a *quantum meruit* count. See also *Toy v. Gong*, 87 Ore. 454, 170 Pac. 936; 5 C. J. 1409; 2 R. C. L. 773.

It is further contended, in effect, that the plaintiff is barred by the statute, hereinafter mentioned, from maintaining this action. The plaintiff is a sole individual, doing business under the name "Electrical Supply Company." Chapter 65, p. 248, Session Laws of 1897, section 4778 R. S. 1908, provides that any person doing business in a representative name "shall not be permitted to prosecute any suits for the collection of * * * debts," until the affidavit, described in the statute shall be filed. In the instant case the required affidavit was filed. This is conceded, but the contention is that the affidavit must also be "recorded," and because not recorded, the plaintiff could not maintain this action. Certificates of partnership must be recorded, because the statute relating to them provides that they "shall be recorded at large by the clerk in a book kept for that purpose." Sec. 4773 R. S. 1908. But the statute relating to affidavits of individuals doing business under a trade name makes no such requirements. It is enough if the instrument is filed and thereafter kept in the office of the county clerk and recorder, as appears was done in the instant case.

The affidavit in question, omitting language not material in this case, reads as follows:

"W. H. Dillon, * * * deposes * * * that he is the sole owner of the business known as Electrical Supply

Company, located at 502 Main Street, in the City of Canon City, Fremont County, Colorado.

W. H. Dillon."

This affidavit is insufficient, for two reasons: First, it does not give the full Christian name of the person represented by the Electrical Supply Company. Secondly, it does not give the address of such person. Both these requirements are contained in the statute above cited, and the failure of the affidavit to comply with them necessitates a reversal of the judgment.

It is not, however, necessary that there be a new trial as to any issue except this single one as to the filing of a proper affidavit. Plaintiff's failure to file the proper affidavit, if such is the fact, is merely a matter in abatement. *Rudneck v. Southern California M. & R. Co.*, 184 Cal. 274, 193 Pac. 775, 778. This conclusion is supported by *Rollins v. Fearnley*, 45 Colo. 319, 323, 101 Pac. 345, holding that a corporation may effectually pay the annual license tax after non-payment is pleaded; and, presenting evidence of the payment, preserve its standing in the pending suit. If upon a new trial it appear that plaintiff has filed, at any time prior to such new trial, the proper affidavit with the county clerk and recorder, it will be sufficient to warrant a judgment in his favor. This procedure is suggested in *Rudneck v. Southern California M. & R. Co.*, *supra*.

The judgment is reversed, and the cause remanded for new trial only upon the issue concerning the filing of the affidavit required by section 4778, R. S. 1908.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,269.

OLSON-HALL v. INDUSTRIAL COMMISSION, ET AL.

Decided March 6, 1922. Rehearing denied April 3, 1922.

Proceeding under the workmen's compensation act.
Claim for compensation denied.

Affirmed.

1. **WORKMEN'S COMPENSATION—Burden of Proof.** The burden of proof is upon the party asserting the claim, and he must show that the injury or death was the proximate result of an accident arising out of and in the course of employment.
2. **Industrial Commission—Fact Findings.** Fact findings of the industrial commission based upon conflicting testimony are conclusive on review.
3. **Evidence—Hearsay.** The rule against hearsay evidence is vitally substantial, and may not properly be disregarded in proceedings under the workmen's compensation act.
4. **Evidence—Statements of Deceased Employee.** Statements of a deceased employee as to his bodily or mental feelings are admissible in evidence; but those as to the cause of his illness, if not within the *res gestae* rule, are not admissible.

*Error to the District Court of the City and County of
Denver, Hon. Charles C. Butler, Judge.*

Mr. DAVID B. GRAHAM, Mr. WILLIAM H. GABBERT, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Messrs. DANA, BLOUNT & SILVERSTEIN, for defendants in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

THIS cause is here a second time. Upon the former review it was remanded to the commission for fuller and

more specific findings. At the first hearing recovery by claimant was denied. Upon further findings compensation was again denied. The first award was reviewed by the district court and affirmed. After further findings by the commission, the cause was again taken to the district court and the action of the commission in denying compensation was there again upheld. It is to review that judgment that claimant now brings the cause here.

The essential facts are that claimant's decedent, John Olson, died at a hospital on October 12, 1918. The record shows that he claimed to have fallen from a ladder while at his work for the Theatre Company on June 9, 1918. His widow and beneficiary claimed that the accident occurred on June 15, 1918, but for the purposes of this decision the discrepancy in date is not important.

There is no direct proof of the accident. The claimant supports her case wholly with certain reports, and alleged conversations said to have taken place with Olson at various times subsequent to the supposed accident, at his home and at the hospital where he died. There is not a scrap of competent testimony to show that there ever was an accidental injury at all.

It is elementary in compensation cases, as in other actions, that the burden of proof is upon the party asserting the claim. It was the duty of claimant to show that the death of her husband was the proximate result of an accident arising out of and in the course of his employment. The alleged fall from the ladder took place either on June 9, or June 15, 1918. The decedent was then upwards of sixty years of age. For approximately four months after the accident he was under the care of at least three physicians, who apparently discovered no evidence whatever of his having met with an accident. Each of them treated him for an organic disease. After his death an autopsy was held, which disclosed at least one serious chronic ailment, that another was developing, and that none of these conditions, in the opinion of physicians, was likely to have resulted from a fall, either recent or remote. On the con-

trary, the medical testimony was practically unanimous that decedent died from pericarditis and hypostatic pneumonia.

There is some testimony which tends to show that there was a possibility of the pericarditis having resulted from an external injury. The only effect of this testimony, however, is to furnish a conflict, and the findings of the commission, on conflicting testimony, is conclusive upon the courts. The rule as to fact findings is laid down in *Passini v. Industrial Commission*, 64 Colo. 349, 171 Pac. 369, as follows:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom."

See also *Prouse v. Industrial Commission*, 69 Colo. 382, 194 Pac. 625; *Industrial Commission v. Johnson*, 66 Colo. 292, 181 Pac. 977; *Globe Co. v. Industrial Commission*, 67 Colo. 526, 186 Pac. 522; *Industrial Commission v. London, etc., Co.*, 66 Colo. 575, 185 Pac. 344.

Error is assigned upon the refusal to admit in evidence an wholly unidentified written statement of the employer respecting a claim of Olson as to the accident; and also because of the exclusion of dependent's notice of the accident and claim for compensation; also to the exclusion of statements made by the deceased at various times long subsequent to the alleged accident. These offers were properly excluded. It is true that the workmen's compensation statutes of most of the states provide that industrial commissions shall reach their conclusions without regard to technical rules of evidence. It is manifest, however, that the rule against hearsay is not technical, but vitally substantial, and may not properly be disregarded under such statutory provisions without grave danger of collusion, imposition and injustice. If a claimant be permitted to make

out a case upon the essential facts of accidental injury upon hearsay testimony alone there is no limit to the frauds and wrongs that may be encouraged and made possible.

In *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, the court in speaking to this question said, at page 469:

"Coming directly to this line of testimony as applied to workmen's compensation cases, it is said in *Boyd on Workmen's Compensation*, p. 1123:

"The statements made by an injured man as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not to be received in evidence. The rule applies to statements made by a deceased workman to a fellow workman as to the cause of his injury.'

"And more fully in *Bradbury on Workmen's Compensation*, p. 403 (800), as follows:

"The statement made by an employe in the absence of his employer, by a deceased man as to his bodily or mental feelings, are admissible in evidence, but those made as to the cause of his illness are not admissible in evidence and where there is no other evidence of an accident arising out of and in the course of the employment than statements made by a deceased employe in the absence of his employer, an award cannot be sustained.' "

The following English and American cases announce and support this rule: *Gilby v. Great Western Ry.*, 3 Butterworth's W. C. C. 135; *Smith v. Hardman, Ltd.*, 6 Butterworth's W. C. C. 719; *McCauley v. Imp. Woolen Co.*, 261 Pa. 312, 104 Atl. 617; *Belcher v. Carthage Machine Co.*, 224 N. Y. 326, 120 N. E. 735; *Englebreton v. Industrial Com.*, 170 Cal. 793, 151 Pac. 421; *Employers Assur. Corp. v. Industrial Commission*, 170 Cal. 800, 151 Pac. 423. In any event the so-called evidence upon the question of whether the accident actually occurred and its effect upon the physical condition of the decedent, which was rejected, was cumulative merely and could not alter the conclusion reached.

Also we fail to see how the fact that the accident oc-

curred on June 9th rather than on June 15th, could in any way affect the result of the proceeding. Neither is it apparent how informal statements of the deceased, made long after the alleged accident, and therefore manifestly not within the *res gestae* rule, should be considered as having weight, even if admitted, as against the direct, positive and satisfying testimony of the attending physicians who performed, and others who assisted at, the autopsy.

We have examined with the most painstaking care, the whole record, and it is apparent that if all matters tendered in evidence by claimant and refused had been admitted, the sole and only effect thereof would have been simply to have made the conflict a trifle more pronounced. There still would have been an utter failure, as matter of law, to make out a case that would have justified an award in her favor. As to the alleged accidental injury all evidence offered was hearsay, and compensation may not be lawfully awarded upon that class of testimony alone.

There was ample competent evidence to support the findings of the Commission. Under such circumstances, bearing carefully in mind the settled rule that the fact findings of the commission, based upon conflicting testimony, are conclusive on review, the judgment is affirmed.

No. 9981.

THE QUINTET OIL COMPANY v. THE BIG FIVE OIL COMPANY.

Decided April 3, 1922.

Action to recover amount of assessment on the capital stock of a corporation. Judgment for defendant.

Affirmed.

1. CORPORATIONS—*Capital Stock—Assessment—Collection.* Where the

stockholders of a corporation agreed that the company might levy assessments on its capital stock, and that if any stockholder should fail to pay the same, he should forfeit his interest, the remedy for failure to pay the assessment was forfeiture, and not a suit to collect the amount due.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Messrs. THOMAS & THOMAS, Mr. J. J. HOLLINGSWORTH, for plaintiff in error.

Messrs. HOWARD & MCCRILLIS, Mr. HAROLD H. HEALY, for defendant in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

DEFENDANT had judgment. Plaintiff brings the cause here for review.

Holders of shares of the capital stock of plaintiff corporation, including the defendant, were associated together by written agreement to aid in the development of a certain tract of land for oil. By this agreement and subsequent action of the plaintiff, the plaintiff might designate and levy an assessment on each share of stock as it might be necessary to raise funds for such development purposes. The defendant paid its assessments so levied, for a time, but finally ceased and refused to pay subsequent and further assessments. Plaintiff brought this action to recover from defendant the amount of assessments alleged to be due.

The agreement provided:

"In case any party hereto fails to put up his share of the expense, he forfeits all his interest herein to the other parties share and share alike."

The minutes of plaintiff company show that upon a failure to pay such assessments by the holder of stock within thirty days after notice, there should be a forfeiture for non-payment to the other stockholders who did pay. Without the agreement the stock was not assessable.

The provision of forfeiture of defendant's stock in case of default in the payment of the assessment thereon, was the penalty prescribed in the agreement, and adopted by plaintiff company, for such default, to the exclusion of any further burden. The plaintiff could have no remedy but forfeiture. The trial court entertained this view and gave judgment for defendant on the pleadings.

We find no error in the record. The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,005.

PEPPERS, ET AL. v. METZLER.

Decided April 3, 1922.

Action on promissory notes. Judgment for defendant.

Reversed.

1. **PLEADING—Counterclaim.** A counterclaim, in so far as its consistency is concerned, is a complaint, and is to be tested as to this question, by the same rules as complaints are tested.
2. **ACTIONS—Remedies.** A remedy based on the theory of the affirmation of a contract is inconsistent with one arising out of the same facts and based on the theory of its disaffirmance.
3. **DAMAGES—Measure of.** In an action for breach of warranty or false representations, the damage would be the difference in the actual value of the subject of sale and the value it would have had at the time, if it had then corresponded to the warranty, or the representations had been true.
4. **TRIAL—Causes of Action—Election.** When a complaining party seeks to rescind a contract because of fraud, and to recover

damages; and also at the same time to affirm the contract and recover damages for a breach thereof, the failure of the court to direct an election, upon motion, is reversible error.

5. *INSTRUCTIONS—Measure of Damages.* An instruction as to the measure of damages, held erroneous under the facts of this case.
6. *DAMAGES—Breach of Contract.* Only such damages are recoverable for a breach of contract of warranty as are shown by the proofs to be the direct and proximate result of the breach. Apprehended damages which are merely conjectural, should be excluded from consideration.

Error to the District Court of Weld County, Hon. George H. Bradfield, Judge.

Mr. LOUIS B. REED, Mr. ARTHUR E. HEALEY, for plaintiffs in error.

Mr. ELBERT C. SMITH, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

SUIT was by R. C. Peppers and Clyde S. Peppers, co-partners, doing business as R. C. Peppers Company, against F. A. Metzler, to recover upon two promissory notes, each for \$300.00, given by Metzler to the company in part payment for a tractor and plow. The case was tried to a jury. Verdict was for defendant for cancellation of the two notes, for recovery of \$600.00 already paid by Metzler on the purchase price, and for \$1,000.00 damages for loss of crops, with judgment accordingly. Plaintiffs bring the record here for review.

The complaint contained two separate causes of action, each on one of the promissory notes. The answer contained a general denial, and also affirmative defenses of failure of consideration, breach of warranty and fraudulent representations. Originally the answer also contained three distinct and separate counterclaims, one arising out of alleged breach of warranty, another for misrepresentation and fraud, and the third for failure of consideration, result-

ing from the averred breach and fraudulent representations.

Before trial plaintiffs moved that defendant be required to elect upon which counterclaim he would rely. This motion was overruled, and error is assigned thereon. Defendants were then permitted, over the objection of plaintiffs, to strike from each of the three counterclaims the words "further answer and." Error is also predicated upon this ruling. The third assignment is based upon the alleged improper admission of testimony offered by defendant as to damages under his several counterclaims. Certain instructions given on the measure of damages are also said to have been conflicting, erroneous and prejudicial.

The first question is whether the several counterclaims are as matter of law predicated upon inconsistent and incompatible causes of action. A counterclaim in so far as its compatibility and consistency be concerned, is a complaint to be tested as to this question by the same rules as complaints are tested. *Pomeroy's Remedies*, sec. 753.

The several counterclaims are upon a single set of facts, which may not be counted upon to support a cause of action for breach of warranty, and at the same time one for rescission because of misrepresentation and fraud. A breach of warranty sounds in contract, a fraud in tort. To sue for damages and rescission for misrepresentations is a denial of the contract; to sue for damages for a breach of warranty is an affirmation thereof. Upon the same facts the two cannot stand together. They are as matter of law inconsistent and conflicting causes and are not properly joined. The rule upon this subject is concisely stated in 20 C. J. 14, to-wit:

"A remedy based on the theory of the affirmance of a contract or other transaction is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance, or rescission, so that the election of either is an abandonment of the other."

The record shows that the counterclaims of defendant rest upon fraudulent representations and upon a breach of

warranty through failure of the implements to do the work for which warranted. If defendant seeks recovery upon fraud, as alleged, then he might recoup damages in an action brought by the plaintiffs for the purchase price; if upon breach of warranty he likewise may recoup in such action damages arising from such breach. In either case the measure of damages would be the difference between the actual value of the subject of sale, and the value it would have had at that time, if it had then corresponded to the warranty, or had the representations been true.

Defendant sought to rescind the contract because of fraud and to recover damages; and also at the same time to affirm the contract and recover damages for a breach. Manifestly he should have been required to elect upon which cause he would rely, and the failure of the court to so direct is reversible error. Had defendant been able to prove either of the affirmative defenses set up he could have recouped whatever damages he could have shown he had thereby suffered.

The court instructed the jury if they found for defendant to award him such damages as would compensate him for the loss of the use of his land for the season, being the value, as the court held, of such crops as the jury believed from the evidence defendant intended to raise and would have in fact planted, harvested and marketed. Upon no theory were such supposed damages proper for consideration. They are too remote and speculative.

Since the judgment must be reversed it ought to be carefully borne in mind by the trial court that damages are recoverable herein only when shown by the proofs to have been the direct and proximate result of the failure of plaintiffs to comply with the terms of their contract. Merely apprehended damages, such as are in their very nature purely conjectural, should be rigidly excluded from consideration.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

No. 10,031.

RUSSELL v. THE CRIPPLE CREEK STATE BANK.

Decided April 3, 1922.

Action against a bank for surplus fund alleged to be remaining from the sale of collateral securities. Judgment of dismissal.

Reversed.

1. PLEADINGS—*Answer*. Pleadings reviewed, and held, that the answer contained no denial of the allegations of the complaint, and that the affirmative matters pleaded, constituted no defense.
2. ACTIONS—*Parties*. It is error for the court on its own motion and over objection, to bring into a suit one who is neither a necessary nor a proper party.

Error to the District Court of El Paso County, Hon. J. W. Sheafor, Judge.

Mr. BARNWELL S. STUART, for plaintiff in error.

Mr. H. MCGARRY, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff and the defendant in error was defendant in the court below, and they will be so designated herein.

The plaintiff by his complaint alleged that, being indebted to the defendant upon a promissory note, he deposited with the defendant as security for said note a large amount of securities; that he thereafter became indebted in an additional sum because of an overdraft; that on the 11th of January, 1917, said indebtedness being unpaid, the securities were sold for a sum in excess of the indebtedness, of which excess defendant received 32 per cent; and that

the defendant refused to pay over to plaintiff the said surplus which had come into its hands.

An answer was filed. A motion to strike certain parts thereof was overruled. A motion to make the answer more specific, by stating the particulars of the sale of said securities as to the time and manner of their sale, etc., was sustained. An amended answer was filed, and a motion to strike and a motion to make more specific were both overruled, although the amended answer does not purport to give the time of the sale of securities, nor the sum received for them, as required by the order of the court. Plaintiff then demurred to the amended answer, the demurrer was overruled, he elected to stand upon his demurrer and the complaint was dismissed. The cause is now before us for review.

The amended answer admits the execution and delivery of the note described in the complaint, and admits that the plaintiff pledged as security for the payment of the note, and the other items of indebtedness, the shares of stock in said paragraph 2, described; but alleges that said shares were pledged for an indebtedness of \$10,000 prior to the date mentioned in the complaint, "at a time when said indebtedness was represented and shown by another promissory note theretofore given by the plaintiff to defendant for the said sum of money, and in which note there was written a contract whereby this defendant and its assignees were authorized by the plaintiff to sell all or any part of said shares of stock at private sale for the purpose of providing a sum for the payment of said indebtedness and accumulated interest thereon after the same became due, together with the expense of such sale and the said contract for the sale of said shares continued in force and effect from the time the same was so pledged until such shares of stock were sold as hereinafter alleged and shown."

It is to be observed that there is no allegation that the prior promissory note, containing the alleged contract, was still held by the defendant or its assignee. The allegation

that the contract was still in force is a mere conclusion of the pleader.

There is no denial of the allegation of the complaint that these securities were pledged for the payment of the note in the complaint mentioned. That being so, the fact of a contract in a note of prior date, though the note were still held by the bank, would have no bearing upon the cause of action presented by the complaint.

The answer further alleges that, the defendant, having been required by the State Bank Commissioner to write off \$114,000 of its assets as valueless, transferred said items so written off, including plaintiff's said indebtedness, to the Golden Cycle Mining and Reduction Company, and that the defendant, as agent of the reduction company, aided in the sale of said securities, and became the recipient of a part of the proceeds thereof which were in excess of plaintiff's indebtedness.

The answer contains no denial of the allegations of the complaint and the affirmative matters pleaded constitute no defense to the action. The demurrer should have been sustained.

Upon the facts stated in the answer it appears that the defendant is attempting to escape liability as pledgee of the securities by the fact that it turned them over, with a mass of other securities, to the reduction company, which company, being liable to an assessment as a stockholder of the bank, took over these written off assets in consideration of its paying its assessment upon the stock held by it. That transaction can hardly be regarded as a sale of the securities, such as the contract pleaded authorizes even if the contract had been well pleaded.

Error is also assigned on the order of the court, made over the objection of plaintiff and without request upon the part of the defendant, making the reduction company a party to the suit. This is an action for money had and received, and the controversy is not such as is contemplated by the Code provision under which a court may introduce new parties. The reduction company was neither a neces-

sary nor a proper party, hence not properly in the suit. *Oles v. Wilson*, 57 Colo. 246, 273, 141 Pac. 489. The objection to the order was well taken.

The judgment is accordingly reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,050.

COATES, ET AL. v. THE BOARD OF COUNTY COMMISSIONERS
OF PROWERS COUNTY, ET AL.

Decided April 3, 1922.

Action to restrain county commissioners from including lands within a proposed drainage district. Judgment of dismissal.

Reversed.

1. DRAINAGE DISTRICTS—*Lands Included*. Chapter 12, S. L. 1911, concerning drainage districts, does not contemplate the inclusion within the district of lands which would not be benefited by the drainage system, and the inclusion of which would not be conducive to the public welfare.
2. PLEADINGS—*Complaint*. Allegations of a complaint in an action to restrain the inclusion of lands in a proposed drainage district, reviewed and held not subject to a general demurrer.
3. EQUITY—*Administrative Bodies—Abuse of Discretion*. Equity may relieve from the action of administrative bodies where discretion has been abused, and affords a proper remedy in such cases.

Error to the District Court of Prowers County, Hon. A. F. Hollenbeck, Judge.

Messrs. HILLYER & KINKAID, for plaintiffs in error.

Messrs. TODD & UNDERWOOD, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit for an injunction to restrain the board of county commissioners of Prowers county from including the lands of the plaintiffs within a proposed drainage district. Other relief, consistent with such injunction is prayed for. A temporary injunction was denied. The cause was dismissed, following the sustaining of a demurrer to the amended complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. The plaintiffs bring the cause here for review.

A petition for the organization of a drainage district was presented to the board of county commissioners, and plaintiffs, who are owners of lands within the boundaries of the proposed district, filed petitions for the exclusion of their lands from the district. The board denied the petitions for exclusion.

From the allegations of the amended complaint, it appears that the proceedings for the organization of the drainage district were carried on in conformity with the provisions of the Drainage District Act of 1911 (Ch. 124, p. 311, S. L. 1911), and were regular and valid except as to the board's refusal to exclude plaintiffs' lands.

The amended complaint alleges that at the hearing before the board of county commissioners sworn testimony was given which clearly established the fact that the lands in question are not seeped, are cultivable, useful and fully so, and would not be benefited by the proposed drainage system, and that their drainage would not be conducive to the public health, convenience, utility or welfare. It is further alleged, in effect, that all this evidence was and remained uncontradicted, and that the action of the board

in refusing to exclude plaintiffs' lands constituted a gross abuse of discretion.

"It is a general rule that only land which will derive a benefit from the improvement should be included in a drainage district." 19 C. J. 618; 9 R. C. L. 645. Our drainage act (S. L. 1911, p. 311) does not contemplate the inclusion within a drainage district of lands which would not be benefited by the drainage system, and the inclusion of which would not be conducive to the public welfare.

This is not a collateral attack on the proceedings for the organization of a drainage district, but is the most direct, as well as the earliest, attack which plaintiffs could make. Equity may relieve from the action of administrative bodies where discretion has been abused. A cause of action was stated in the amended complaint, and it was error to sustain the demurrer thereto.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,058.

COULTER v. BARNES.

Decided April 3, 1922.

Action in damages for libel. Judgment of dismissal.

Affirmed.

1. **LIBEL—Insanity.** The publication of an article stating that a person had been recommitted to the insane asylum, does not falsely impute insanity, and is not libel *per se*.

2. *Pleading—Special Damages.* Where the libel is not one *per se*, the plaintiff must allege special damages.

*Error to the District Court of Larimer County, Hon.
George H. Bradfield, Judge.*

Mr. O. A. ERDMAN, for plaintiff in error.

Mr. AB. H. ROMANS, Mr. PAUL W. LEE, Mr. GEORGE H. SHAW, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for damages for libel. The cause was dismissed, following the sustaining of a demurrer to the replication, and plaintiff brings the cause here for review.

The facts admitted in the pleadings are as follows: The defendant is the publisher of a newspaper. On November 21, 1919, he published, in his newspaper, the following article of and concerning the plaintiff:

“HOWARD COULTER SENT BACK TO ASYLUM.

“At a hearing in Fort Collins today, before a lunacy commission, Howard Coulter was recommitted to the State Asylum for Insane at Pueblo. Dr. Delehanty, an expert alienist, was called in to assist in the examination.”

In 1918 there was an insanity inquisition with reference to the plaintiff, and terminated in a judgment ordering his commitment to the insane asylum. He was there confined for several months, and then paroled and given in charge of a relative. On November 21, 1919, a lunacy commission, which was appointed upon plaintiff's petition therefor, determined that plaintiff was not restored to reason but was then insane and was subject to the order of commitment entered as a result of the original adjudication.

So far as the published article, alleged to be libelous, imputes insanity to plaintiff, if it does so at all, it is justified by the truth, since there was, in fact, a hearing before a lunacy commission, and the commission determined that plaintiff was insane.

The falsity of the article lies in its assertion that the commission re-committed plaintiff to the insane asylum, and this is not libel *per se*. It does not falsely impute insanity. Plaintiff insists that the article implies that there was a final adjudication, and is false for the reason that he was later declared sane by a jury. If so, it still was not libelous *per se*. It is not apparent that plaintiff would be libeled by a statement to the effect that the lunacy commission's finding was final.

Where the libel is not one *per se*, the plaintiff must allege special damages. 25 Cyc. 454. In the instant case no special damages are alleged, and for that reason there was no prejudicial error in dismissing the action.

The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,067.

DOWNER v. BIRMINGHAM.

Decided April 3, 1922.

Action in replevin. Judgment for plaintiff.

Affirmed.

1. CHATTEL MORTGAGE—*Misspelled Name—Notice*. Record of a mortgage given by Birmingham is constructive notice of one given by Birmingham. Validity of records and their effect as to giving constructive notice does not depend on accurate spelling, where the inaccuracy is not clearly misleading.
2. IDEM SONANS—*Records*. The doctrine of *idem sonans* applies to records,

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

MR. CHARLES E. FRIEND, for plaintiff in error.

MR. H. E. LUTHE, for defendant in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action in replevin. The plaintiff sues as mortgagee under a chattel mortgage of the property sought to be replevied, and relies on the mortgage. The defendant is the ex-officio Sheriff of the City and County of Denver, but the action is defended for a judgment creditor at whose instance the defendant levied execution against the property. There was a verdict and judgment for plaintiff, and defendant brings the cause here for review.

The plaintiff's chattel mortgage was recorded prior to the inception of the lien of the judgment creditor. The mortgage, and the record thereof, gives the name of the mortgagor as "Thomas F. Bermingham." Defendant contends, in effect, that the mortgage is invalid and its record is not constructive notice, as to him, because the real name of the mortgagor, being the same person as the judgment debtor, is "Thomas F. Birmingham." Defendant admits having knowledge of the record of the chattel mortgage in question after making an examination of the records of the county clerk and recorder, and there is no claim of having been misled by reason of the substitution of an "e" for an "i" in the mortgagor's name. There is a conflict in the evidence as to whether the second letter in the mortgagor's name is an "e" or an "i" but this is not a material issue. Bermingham and Birmingham, from all that appears in the record, are one and the same name, but if different names, then they must be regarded one and the same under the rule of *idem sonans*.

A record of a mortgage given by Thomas F. Bermingham is constructive notice of one given by Thomas F. Birmingham.

ham. A party does not have his record rendered a nullity simply because he, or another party to the instrument or proceeding, has misspelled a surname in some manner not clearly misleading. The validity of records and their effect as to giving constructive notice does not depend on accurate spelling. In *Jenny v. Zehnder*, 101 Pa. 296, the substitution of "t" for "d" in Zehnder's surname was not considered to be a fatal error. The doctrine of *idem sonans* applies to records. *Bloomer v. Cristler*, 22 Colo. App. 238, 123 Pac. 966. This being true, the chattel mortgage in question was valid and its record was constructive notice as to the judgment creditor.

The defendant, in his answer, also attacked the chattel mortgage as a fraudulent conveyance. As to this branch of the case, the record discloses no reversible error.

The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,106.

NATIONAL BANK OF WRAY v. WILDMAN.

Decided April 3, 1922.

Action on promissory note. Judgment for defendant.

Affirmed.

1. APPEAL AND ERROR—*Fact Findings*. Findings of fact by the trial court, made on conflicting evidence, will not be disturbed on review.
2. PRINCIPAL AND AGENT—*Unauthorized Acts—Ratification—Burden*

of Proof. The burden of proving ratification of an agent's unauthorized acts rests on the party asserting it; but where an agent makes an unauthorized contract, and knowledge that he has done so is brought home to his principal who thereupon ratifies a portion of the contract and accepts the proceeds thereof, the burden rests upon the principal to show that he had no knowledge of the unratified portion, and that such lack of knowledge was not due to want of diligence.

3. *Ratification in part.* A principal may not affirm a portion of an unauthorized contract, and disaffirm the remainder.

Error to the District Court of Yuma County, Hon. L. C. Stephenson, Judge.

Mr. E. B. SIMMONS, Mr. WILLIAM H. GABBERT, for plaintiff in error.

Mr. M. M. BULKELEY, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT in error executed his note for \$600.00 secured by chattel mortgage on certain corn. This note was owned by one Simmons, who assigned it to plaintiff in error as collateral. The bank sought to replevin the corn. Defendant, alleging accord and satisfaction, prevailed herein, and plaintiff brings error.

Upon sufficient evidence the trial court found that Simmons settled with defendant for three horses and a certain assignment of interest in an estate. Credit was given by the bank for the horses but is refused for the assignment. Defendant contends that at the time of his settlement with Simmons he had no notice of the bank's interest and that Simmons dealt with him as owner. On these questions the evidence is conflicting. The trial court accepted defendant's version and we are bound thereby.

The testimony shows that the credit given Simmons by the bank was not conditioned on the collateral; that Simmons was looking after the note and started the present suit without directions from plaintiff; that the bank gave

the matter no particular attention and sent no notice to defendant; that Simmons sent a man for the horses with a written order referring to them as "the horses I purchased"; that no communication passed between defendant and the bank; that the bank gave credit for the horses according to Simmons' contract; that three days prior to the bringing of this suit the bank wrote one Martin, a constable, concerning the corn in question and transmitted to him certain instructions relating thereto which it represented to be the instructions of Simmons. Defendant contends that Simmons had full authority from the bank to settle the note as owner and we think this evidence supports that contention.

Assuming that Simmons acted without authority, knowledge that he had done so was brought home to plaintiff. If it knew the full extent of that action, it has ratified. If it knew only of the amount agreed upon for the horses, accepted the contract as far as apprised thereof, and made no effort to acquaint itself with the details, it is bound.

The burden of proving ratification of an agent's unauthorized acts rests on the party asserting it. As a general rule, when such ratification is alleged, there must be proof that the details of the transaction were brought home to the principal. Where, however, an agent makes an unauthorized contract, and knowledge that he has done so is brought home to his principal who thereupon ratifies a portion of the contract and accepts the proceeds thereof, the burden rests upon the principal to show that he had no knowledge of the unratified portion and that such lack of knowledge was not due to want of diligence. A principal may not affirm a portion of an unauthorized contract and disaffirm the remainder.

"For the application of this rule it is not necessary to show that the principal, who takes advantage of an unauthorized contract by his agent, had knowledge of all the terms and conditions entering into it. *Moyers v. Fogarty*, 140 Ia. 701, 711, 119 N. W. 159, 163.

"In adopting the unauthorized conduct of its agent, the

plaintiff was obliged to inquire and ascertain the full extent of it, or be bound in the same manner as if he had done so." *Aultman Threshing & Engine Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074, 1076.

None of the Colorado cases cited and relied upon by plaintiff in error involve this question.

Here the unauthorized contract was established, the fact that some such contract had been made was brought home to the principal. A portion thereof was made known in detail to, and ratified by, the principal and there is no evidence that the principal did not know the full details thereof, or that it made any effort to ascertain it. Hence the principal was properly held to have ratified.

The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,144.

PEOPLE, EX REL. FULTON v. O'RYAN as President of the
State Board of Charities and Corrections, ET AL.

Decided April 3, 1922.

On motion for judgment for costs.

Motion Denied.

1. COSTS—*Officers*. No costs can be recovered against a public officer prosecuting or defending as such, in good faith.

MR. FRANK McLAUGHLIN, for plaintiff in error.

MR. VICTOR E. KEYES, attorney general, MR. CHARLES ROACH, deputy, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS was a proceeding in mandamus in the district court by Fulton, claiming under the civil service law, as secretary of the State Board of Charities and Corrections, to compel the board to pay her as such.

The district court denied the mandamus; we reversed that decision on error. The plaintiff in error now asks judgment for costs. The rule seems to be that no costs can be recovered against a public officer prosecuting or defending as such in good faith. *Houston v. The Neuse River Navigation Co.*, 53 N. C. 476; *Scrafford v. Gladwin County Supervisors*, 42 Mich. 464, 4 N. W. 167; *O'Connor v. Walsh*, 83 N. Y. App. Div. 179, 82 N. Y. Supp. 499.

Motion denied.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,273.

**THE EMPIRE ZINC COMPANY v. THE INDUSTRIAL COM-
MISSION, ET AL.**

Decided April 3, 1922.

Proceeding under the workmen's compensation act.
Judgment for claimant.

Affirmed.

1. **WORKMEN'S COMPENSATION—Findings of Commission.** On review of an industrial commission case, the appellate court may consider only the question of whether there is evidence to support the findings of the commission. The award is conclusive upon all matters of fact properly in dispute, where supported by evidence or reasonable inference to be drawn therefrom.

2. *Wife—Dependency.* Under the provisions of section 52, chapter 210, S. L. 1919, a wife is presumed to be wholly dependent upon her husband for support, unless she be voluntarily separated, living apart from, and not dependent upon him in whole or in part, all three of which elements must be made to appear before the presumption of dependency can be overthrown.
3. *Dependency of Wife—Evidence.* Evidence reviewed and held to support the findings of the commission that the claimant was not voluntarily separated or living apart from her husband at the time of his death, and that she was wholly dependent upon him for support.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. EDWARD C. STIMSON, Mr. PAGE M. BRERETON, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. JACOB V. SCHAEZEL, Mr. WALTER E. SCHWED, for defendants in error.

En banc.

MR. JUSTICE WHITFORD delivered the opinion of the court.

THIS is an action brought in the district court of the City and County of Denver to set aside the finding and award of The Industrial Commission in the matter of the claim of Zuzanne Zajac under the Workmen's Compensation Act. The court confirmed the findings and award of the Commission and the plaintiff brings error.

The findings of the Commission, so far as now material, are as follows:

"From the evidence submitted herein, the Commission further finds that the decedent and the claimant, Zuzanne Zajac, were married February 17th, A. D. 1901, in Val. Dubova, then a part of Austria. That the decedent came to America some time in 1902, and from that date until the date of his death, lived in the United States of America. That as a result of the marriage above described one child was born, now nineteen years of age, and married to Paul

Kerewkini, of Val. Dubova, now Czechoslovakia Republic. That during all of the time between 1902 and a short time prior to the decedent's death, the claimant and the decedent kept in touch with each other and recognized the relationship that existed between them. That prior to the World War the decedent contributed to the support of the claimant herein. That on March 30th, A. D. 1920 the decedent wrote a letter to the claimant which would indicate that he was in hopes of returning soon to his family in Europe and that he had endeavored, to the best of his ability, to write to the claimant and in other ways clearly recognized the relationship existing between the decedent and the claimant.

"We feel that we must take notice of the war conditions that have existed in the world since 1914. It is a matter of common knowledge that communication between Europe and the United States, since the declaration of war in 1914, has been difficult and at times impossible. * * *

"In this case, the claimant has established her relationship to the decedent. Her evidence clearly indicates that the separation between the decedent and the claimant was not voluntary on the part of either. We, therefore, find that the claimant was not voluntarily separated or living apart from the decedent at the date of his death.

"We further find that the decedent made no contribution to the claimant during the period of the world war beginning 1914 and continuing to the date of his death. We hold, however, that where the evidence of the marriage relation is proven and it is established that such relationship continued until the date of decedent's death, that the marriage under our law is sufficient to entitle the wife to claim total dependency regardless of the actual dependency that may exist."

The plaintiff in error insists that the evidence submitted is insufficient to support the finding, under section 52 of the Act, which provides:

"Section 52. For the purposes of this act the following described persons shall be conclusively presumed to be wholly dependent:

“(a) Wife, unless it be shown that she was voluntarily separated and living apart from the husband at the time of his injury or death and was not dependent in whole or in part on him for support.”

We said in *Passini v. Industrial Commission*, 64 Colo. 349, 171 Pac. 369:

“This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom.”

The evidence with respect to the relationship of the claimant and the decedent consists of the claimant's deposition taken in Valaske Dubova, Czechoslovakia Republic, to which is attached two exhibits, one the certificate of marriage and the other a letter to her from her husband, dated at Leadville, Colorado, March 30, 1920.

That the claimant and decedent were husband and wife is not controverted. That being so, she is conclusively presumed, under the language of the act, to be wholly dependent, unless it shall be made to appear that she was (1) voluntarily separated and (2) living apart from her husband at the time of his death, and (3) was not dependent in whole or in part on him for support. The statute is in the conjunctive, and all three of these elements must be made to appear before the conclusive presumption of dependency of the wife can be overthrown.

The testimony of the claimant supports the finding of the Commission, when she says in her deposition that “I could not have supported myself without the help of my husband.” The evidence shows that there was no divorce or legal separation or estrangement, nor any intention on the part of either spouse not to maintain the marriage relationship. It is true the separation was an unusually protracted one. But the question does not turn on time or distance, but upon the nature and character of the ab-

sence and the intention of the parties respecting it. Intent is an important element in determining the nature of the absence. There is no evidence suggesting the inference that either the claimant or the decedent had intentionally abandoned the other, or had formed the intention of permanently living separate and apart from the other spouse. The last letter of the decedent to his wife was couched in most endearing and affectionate terms both to her and their daughter, in which he consoles his wife in her loneliness, with the hope of an early return to her.

We think the evidence sufficient to support the finding, and the judgment of the district court is affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

APRIL TERM, 1922

No. 9819.

THE FORT MORGAN RESERVOIR & IRRIGATION CO., ET AL. *v.*
MCCUNE, STATE ENGINEER, ET AL.

Decided March 6, 1922. Rehearing denied May 1, 1922.

Action involving the claim of a reservoir company to the right to recapture and apply water seeping from its reservoir. Decree upholding the claim.

Reversed.

1. **WATER RIGHTS—Water Officials—Duties—Power of Courts.** Water officials must distribute water according to decreed priorities, and a court has no power to direct them to do that which the duties of their office does not require of them.
2. **Seepage Water—Appropriation.** Water escaping from a reservoir or a ditch, underground, and becoming percolating water which will naturally reach a public stream, must be regarded as a part of the stream; it belongs to the appropriators in the order of their priorities when needed, and cannot be made the subject of a direct appropriation.

Error to the District Court of Weld County, Hon. Robert G. Strong, Judge.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY, Mr. STOTON R. STEPHENSON, for plaintiffs in error.

Mr. HARRY N. HAYNES, Mr. S. E. NAUGLE, Mr. HAROLD D. ROBERTS, Mr. CHARLES W. WATERMAN, Mr. CALDWELL MARTIN, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiffs in error were plaintiffs below in a suit to enjoin A. A. Weiland, as state engineer, and other water officials named, from enforcing an order of the state engineer allowing The Prewitt Reservoir and Land Company to use certain seepage and underflow waters alleged to be tributary to the South Platte River, which said use was alleged to be contrary to the decrees of appropriation, and injurious to the plaintiffs' priorities. The present state engineer was made a party on succeeding to the office. The court found in favor of the defendants, dismissed the complaint, and directed the water officials to recognize the water discharged from the drainage ditch of the reservoir company as belonging to that company, and to permit a re-diversion thereof by the other irrigation companies "to the same effect as is designated in the order made by the former state engineer * * * whether it was entered with or without jurisdiction" said order being adopted as the order of the court in the premises. The decree thus entered is now here for review on error.

This case presents for determination two questions: First, was there error in the judgment in that it directed the water officials to distribute undecreed water to the non-official defendants, or in other words, because it directed said officials to take affirmative action in the premises? Second, was there error in determining that the water from the drainage ditch in question belonged to the reservoir company?

Under the statutes and decisions of this court, the water officials must distribute water according to the tabulated decrees; they have to do only with decreed priorities; with unappropriated waters they have no concern.

So long as all the water is required to supply decreed priorities, said officials should permit no water to be diverted for new appropriations. Whenever there is a surplus of water, either from floods, or because of small demands therefor by appropriators, the officers have no right to interfere in the diversion of such surplus. All new appropriations must be made from surplus water, whether

for storage or direct irrigation. When, therefore, the court directed the state engineer to distribute undecreed waters from said drainage ditch, he was directing the officer to do that for which there was no authority. If, upon the equities of the case, as shown in the evidence, the court was of opinion that the defendants were entitled to the water in question, he might properly have enjoined the officials from exceeding their authority by distributing this water to others. If the facts justified it, the court could have enjoined the officials from interfering with the defendants turning into their ditches the water which they claimed; but the court had no power to direct the water officials to do that which the duties of their office did not require of them.

The effect of this decree in the respect named is to adjudicate the question of appropriation in a nonstatutory proceeding in which but a small number of the appropriators interested were parties, and that, too, while a statutory proceeding was pending in which a claim for this water had been filed.

The second question is of greater importance, and must be determined by reference to established principles of irrigation law. In the statement and claim filed with the state engineer in 1914 the reservoir company claimed sixty cubic feet per second of time "for irrigation purposes."

The theory of defendants in error now appears to be that they are entitled to the water as a part of their original diversion and appropriation.

In *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107, this court had under consideration the right of Ramsay to appropriate underground water alleged to have escaped from a reservoir and ditches, where the seepage has been long continued, and was naturally tributary to the Platte River. We held that when it appears that such waters will ultimately return to the river, they are a part and parcel thereof, whether the limit of time in which they reach the river be long or short; that as soon as they start on their way to the river, and it is apparent that they will reach it, they

constitute a part of the stream, and are not subject to independent appropriation, as new or added water, or because they have been used to serve one priority.

The same doctrine was again announced in *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 Pac. 503, where the court said:

"The fact that these waters have been captured before they again reach Dry Creek in no wise strengthens the position of petitioners, for the waters are to be considered a part of the stream from the moment they are released by a user, under an appropriation from it, and they must be permitted to return to the stream for the benefit of other appropriators therefrom, in the order of their priorities."

In *Trowel Company v. Bijou District*, 65 Colo. 202, 176 Pac. 292, there was presented the case of a reservoir company assigning its supposed right to seepage from its reservoir, the construction of a ditch by said assignee for the collection of such water, and a claim by him of a right to the use of it. In denying the right to the water in that case we said:

"Doubtless a reservoir owner, if he may have acquired the right of way, may construct a ditch and drain the lands which the reservoir may have damaged, as an alternative to being mulcted in damage, but this can not confer the right to sell the use of such drainage water if it may naturally return to the stream."

And again:

"The law makes no distinction as relates to the return of water to the stream between that from a reservoir supplied by a natural stream, or from a ditch supplied directly from the stream, regardless of the fact that the reservoir may be chiefly supplied in time of high water, or in the non-irrigation season."

In that case was determined also, by agreement of the parties, the case of *Samples, et al. v. The Trowel Land & Irrigation Company*. In that action the irrigation company sought a mandatory injunction to compel the water officers to divert the water from the Shoemaker Ditch into

the Trowel Ditch. The water officers demurred to the complaint, and upon the overruling of the demurrer elected to stand thereon, and the mandatory injunction was granted. The complaint failed to allege a decreed right to an appropriation in the ditch. We there said:

"It has been uniformly held by this court that the decree in such a case is the sole and only guide and authority for water officials, from which they must determine in the discharge of their duties the relative rights of parties, the volume to which different ditches are entitled, the point of diversion, and all other data necessary to a distribution of the waters in accordance with the provisions of the decrees."

It was therefore held that the mandatory injunction was improperly issued. That is important as bearing on the first point herein discussed.

The next case in the order of time in which the matter of seepage had consideration is the *Rio Grande Reservoir & Ditch Co. v. The Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 Pac. 129. Defendant in error in that case sought to make an original appropriation of water seeping from a reservoir constructed by the plaintiff in error. The opinion states of this claim that "the right is based upon the theory that the waters having been impounded in the reservoir during the winter months when direct irrigation is impossible, have not been and could not have been appropriated for direct irrigation." This court, however, applied the rule laid down in the Ramsay case to the effect that seepage water belonged to the river, and that no direct appropriation could be made of it except subject to vested rights.

It is said, however, that the case of *McKelvey v. North Sterling Irrigating District*, 66 Colo. 11, 179 Pac. 872, sustains this judgment. The facts in the two cases are quite different; in the McKelvey case there was no consideration of seepage water. From the findings of the trial court it appeared that water from the North Sterling Ditch broke through the bank where the ditch crossed a draw, hitherto

dry, and water to the amount of four cubic feet per second of time escaped in the above named manner, and ran down the draw. The court specifically found "that said waters so escaping are not merged or mingled with any other waters." It involved running, and not percolating water. This case throws no light upon the question here under consideration.

The instant case is distinguished from those cited above only in the fact that seepage water from a reservoir is claimed as a part of the original storage appropriation, and not for a new and direct appropriation.

Treating this case, then, as presenting a matter not hitherto directly in issue in any case, it remains to ascertain whether or not the principles laid down in the preceding cases are applicable to the facts of this case. Beginning with the Ramsay case the principle upon which the decisions are based appears to be that water escaping from a reservoir, or ditch, *underground*, and becoming percolating water which will naturally reach a public stream, must be regarded as a part of the stream. This appears to be in all the cases the *ratio decidendi*. That being so, no reason appears why the principle should not be applied in this case.

These cases show that it has been held by this court that the question of diligence in attempting a recapture, or the time during which the seepage has run, or the question whether or not the water was appropriated when not needed for direct irrigation, is not material. When it has become, potentially, under the rule above stated, a part of the river, it belongs to the appropriators in the order of their priorities whenever needed. It cannot, therefore, be made the subject of a direct appropriation nor can it, by a fiction, be regarded as still in storage, or a part of stored waters. The danger from a different rule appears from the following:

This is not seepage through the banks only. According to Engineer Bishop, testifying for the defendants, the water escaped through the bottom of the reservoir, drove

the old ground water forward and upward, and raised the water table over the entire area north, northeast and northwest of the reservoir. This distinguishes the case from the McKelvey case. The claim is for sixty cubic feet of water, which it is stated is the total capacity of the ditch.

From the record it appears that the loss by seepage varies with the changing depth of water in the reservoir. It also appears that the loss is decreasing from year to year. A decree for all that escapes when the reservoir is full would give a right to more water than escapes at lower stages, and the amount which may be fairly allowed in one year might be far too large in subsequent years. If, for example, the ditch be given the sixty cubic feet claimed, because that was found to be the amount of seepage from a full reservoir when the appropriation was initiated by beginning the construction of the ditch, and that quantity be distributed to it at other stages of water in the reservoir, or in later years, when the seepage is not so great, the claimants will be getting seepage to which they have no right, even on their own theory.

This illustrates the difficulty which will be encountered in the distribution of seepage water under the rule proposed by defendants in error. It would clearly be impracticable to allow a ditch a right changing from time to time as to quantity, as the water in the reservoir varied in quantity.

The justice of allowing reservoir companies to control the water which they have diverted is not to be questioned; but it should be borne in mind that they do not own the water, but have only a right to its use; which use must be consistent with the rights of other appropriators. When water has escaped from a reservoir and become a part of the underground waters, its identification as reservoir water is impracticable, if not impossible. The rule to be applied in such a case must take account of the rights of others, and be of general and practicable application. Such is the rule above stated and applied.

It follows that the district court erred upon both of the

propositions discussed herein, and the judgment is accordingly reversed, and remanded for further proceedings in harmony with the views herein expressed.

MR. JUSTICE DENISON and MR. JUSTICE BURKE dissent.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE BURKE dissenting.

I regret my inability to concur with the majority. It seems to me that the conclusion reached by the court leaves the law on the main question at issue in such an unsettled condition in this jurisdiction as to make imperative a statement of the reasons for this dissent.

The principal question here presented is the right to the use for irrigation of waters escaping from the Prewitt Reservoir, an irrigation storage project. The issues are thus clearly stated in the opening brief.

"Two principal issues were presented for the final determination of the court, to-wit (a) The validity of the order of the state engineer and the jurisdiction of that officer in the premises; (b) The alleged right of the Prewitt Reservoir & Land Company and other non-official defendants to recover the waters escaping from the reservoir * * * so that the same might be separated from the waters of the river and devoted to the exclusive use of said defendants."

For convenience I consider them in that order.

In determining the first it must necessarily be assumed that defendants are entitled to the waters in question. If so it seems clear that they must look for protection to the water officials because we have held that such claimants have no place in a general adjudication proceeding. *Rio Grande Res. & Ditch Co. v. Wagon Wheel Gap Imp. Co.*, 68 Colo. 437, 191 Pac. 129.

These water officials are directed to distribute water "in accordance with the right of priority of appropriation, as established by judicial decree" but they also "have the authority to make such other regulations to secure the equal

and fair distribution of water, in accordance with the rights of priority of appropriation," etc. Sec. 3344 R. S. 1908.

Counsel for plaintiffs admit an exception to the rule that water officials may distribute water only "according to tabulated statement of priorities," that exception being "where water is turned into a stream from a reservoir to be taken out again to be applied to the lands for which it was intended." Sec. 3225 R. S. 1908.

If these defendants are entitled to the water in question it is because, under the law, it is to be treated exactly as water voluntarily turned out by them into the stream to be so carried, taken out and applied. It therefore comes within the admitted exception.

Defendants, however, did not rest their case upon the validity of the order of the state engineer and were not required to do so. If for other reasons than the order they are entitled to have the water in question distributed as directed the judgment herein should so declare. Equity having taken jurisdiction for one purpose will hear and determine all matters necessarily involved.

The following facts are either admitted by the parties or found by the court upon sufficient evidence.

Before any water was run into the reservoir defendants' engineer, under their directions, investigated the feasibility of saving anticipated percolation in order to use the recaptured water and avert damage therefrom. The reservoir was completed and water turned in November 21, 1912. Within three weeks thereafter excessive seepage appeared. Final survey of the drain ditch was begun December 16, 1912. Defendants filed with the state engineer their sworn statement and map claiming the escaping waters. February 13, 1913, construction of the drain ditch was begun with promptness and completed with diligence. The waters diverted into the reservoir were otherwise unappropriated. All waters in the drain ditch came from the reservoir. These recaptured waters are but seventy per cent of the total seepage, the remaining thirty per cent

returns to the river and is available for direct irrigation by prior appropriations. The whole would be unavailable but for the reservoir diversion. Without defendants' recapture of a large portion of this seepage their reservoir project would be economically untenable. The drain ditch was constructed by defendants with the intent and for the purpose of supplying the recaptured waters to their consumers for immediate irrigation when needed and reim-pounding the same when not needed.

The question now is, "May a reservoir appropriator who takes his water for storage during the non-irrigating season, who finds it escaping from his ditch or reservoir before it has served the purpose of its diversion, who begins promptly and prosecutes to completion with diligence a plan for its recapture, whose intent to recapture is made continually manifest, who retakes it for the purpose of its original diversion before it has become the basis of another appropriation, be permitted to so apply it?" Plaintiffs assert the negative. They contend that the moment seepage begins and it is manifest that the escaping water, if not interfered with, will eventually return to the stream, it belongs thereto and can not be retaken by the reservoir appropriator. They assert that this position is supported by adjudicated cases in this court and the doctrine thus firmly imbedded in our irrigation law.

Those authorities, they say, are the following: *Water S. & S. Co. v. L. & W. Res. Co.*, 25 Colo. 87, 94, 53 Pac. 386; *Buckers Irr. Mill & Imp. Co. v. Farmers' D. Co.*, 31 Colo. 62, 70, 72 Pac. 49; *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107; *In re German Ditch & Res. Co.*, 56 Colo. 252, 139 Pac. 2; *Durkee Ditch Co. v. Means*, 63 Colo. 6, 164 Pac. 503; *Trowel Land & Irr. Co. v. Bijou Irr. Ditch Co.*, 65 Colo. 202, 176 Pac. 292; *Rio Grande Res. & Ditch Co. v. Wagon Wheel Gap Imp. Co.*, 68 Colo. 437, 191 Pac. 129.

An examination of these cases, and a comparison of their facts with those in the instant case, shows no one of them in point.

In *Water S. & S. Co. v. L. & W. Res. Co.*, *supra*, the lan-

guage relied upon by plaintiffs is:

"Waste waters which are again returned either to the main stream, or its tributaries, become a part of the waters of the stream the same as though never diverted, and inure to the benefit of appropriators in the order of their appropriations."

This statement is general and unless "waste waters" referred to by the court therein are the kind of waters here involved the language is inapplicable. The fact is that the water in question in that case had served the purpose for which it had been diverted, or been permitted to escape with no manifestation of an intent to retake it and no question of the right of the original appropriator thereto was, or could have been, involved.

In *Buckers Irr. Mill & Imp. Co. v. Farmers' D. Co.*, *supra*, there was no question of an attempted recapture by reservoir appropriators. The Buckers Company was merely claiming water which it insisted it had developed. This was a "development" from sloughs, surface and seepage waters. It made no pretense that this water had escaped from its diversion. The court expressly found that "no question of percolating waters is involved." None of the material facts of the Buckers' case are similar to those before us.

In *Comstock v. Ramsay*, *supra*, the contest was over surface water which had developed in excessive quantities in 1890 and 1891. The first attempt at a diversion of any of it did not occur until 1894. Ramsay's claim to the seepage waters rested upon a conveyance by Gordon and Varvel who did not construct their ditch until 1907, and the main question was whether such seepage waters were tributary to the river. It appeared that upon them "old decreed priorities have long depended for their supply," "that such water is not only now, but for years has been, a material and substantial source of supply to the South Platte river." True it is said that:

"When it is shown or admitted that these waters ultimately return to the river and thereby augment and re-

plenish its flow, they are part and parcel thereof, whether the limit within which this occurs be long or short. The moment they are released by a user under an appropriation from the river, which has been duly decreed, and start back in their course to the stream, they become and are as much a part thereof as when they actually reach the stream. Whenever these waters start to flow back to the river and it is apparent they will reach it, they constitute a part of the stream."

Upon this language, more than any other in the adjudicated cases, rests the contention now made by plaintiffs, but the applicability depends upon a similarity of facts wholly absent. The waters had become actual seepage. No claim was made to them by the original appropriator. No attempt had been made by it to recapture them. No diligence had been shown by any one. The water had served the purpose of its original diversion and had become the basis of other appropriations. Nor must we overlook the language following that last quoted, and which modifies and explains the statement there made, i. e., such waters "are not subject to independent appropriation as new or added water, or because they have been used to serve one priority." The water there discussed by the court is water which has left "the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him." The sole question disposed of in the Comstock case is thus summed up by the court:

"What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such *bona fide* appropriators and users of such waters and a new claimant, the former has the first and better right."

It is thus observed that the question now before us is left wholly untouched by the Comstock case save for an

inference from general language applied there by the court to a wholly different state of facts, and afterwards qualified.

In the German Ditch & Reservoir case, *supra*, the action was one for the adjudication of priorities from Dry Creek. The question arose upon an application for rehearing, review and reargument to determine whether Dry Creek was a natural stream. Interveners contended that it was and that its waters had long since been appropriated by decrees on the South Platte river and that such waters had been used thereunder for many years. It appeared that waste and seepage waters began to flow into Dry Creek between 1880 and 1885, which condition continued and increased through many years to the date of the hearing. Under such circumstances the trial court found that Dry Creek was not a tributary of the South Platte river and that finding we reversed. There is nothing in the case which throws any light upon the question now before us.

The Durkee Ditch Company case, *supra*, was likewise a proceeding for the adjudication of priorities. The petitioner took its waters from Madsen Gulch which emptied into Dry Creek. These Madsen Gulch waters were seepage and return waters and the question was whether Madsen Gulch was tributary to Dry Creek and appropriations on the latter thereby interfered with. The holding was that the waters of Madsen Gulch were tributary to Dry Creek and not subject to independent appropriation. These were not escaped waters. No original appropriator was claiming them and they had all served the purpose of their original diversion.

The Trowel Land & Irr. Co. case, *supra*, was a general adjudication proceeding and we are concerned only with that portion of it relating to the claim of the Trowel Ditch under the alleged rights of the Shoemaker seepage ditch. The Shoemaker ditch had a conveyance of the seepage water in question from the Jackson Lake Reservoir, and had succeeded to the rights of the Currey Ditch. The appropriation claimed by the Currey Ditch had been aban-

done and it thereafter became a natural water course, collecting and carrying to the river under ground waters. It also carried waters escaping from Jackson Reservoir. These waters it was impossible to distinguish. Until the construction of the Jackson Reservoir the lands, afterwards drained by the Shoemaker Ditch, were cultivated and dry. Thereupon they became seeped and swampy. One damage suit was initiated and others threatened against the Jackson Lake Company by reason of this seepage. The construction of the drainage ditch was a compromise of these claims and the reservoir company contributed to it to escape liability. Shoemaker was an outsider and built this ditch on the theory that he would be entitled to the water collected. It is said in this opinion that:

"The law makes no distinction as relates to the return of water to the stream between that from a reservoir supplied by a natural stream, or from a ditch supplied directly from the stream, regardless of the fact that the reservoir may be chiefly supplied in time of high water, or in the non-irrigation season."

But again the language must be applied to the facts there under consideration and those only. The reservoir company there was not claiming the water. It was merely attempting to escape a liability and to that end had transferred its supposed rights. Lack of diligence, rather than diligence, was disclosed. The original appropriator had manifested no intent to recapture and use the water. The case is not in point.

In the Rio Grande Res. & Ditch Co. case, *supra*, appear many facts similar to the case at bar. If the main opinion there only were looked to some excuse might be found for its citation. But again the facts are in many particulars different. On the point here involved three of the Justices dissented and two of them wrote dissenting opinions. On application for rehearing this opinion was given a construction *Per Curiam*, which must be taken as absolutely

limiting and controlling the authority. That construction reads:

"The sole question determined as to seepage water is that no decree, on the facts of this case, for an appropriation thereof by the reservoir company, for direct irrigation, antedating all appropriations from the river for like use, can lawfully be awarded. No other question, upon the subject of seepage, has been presented, considered or adjudged herein."

It must be observed that the Justice who wrote the opinion, and those concurring therein, acquiesced in this construction. It is therefore certain that the Rio Grande case is authority for nothing in the instant case save that the Reservoir Company would not be entitled to ask an original, direct appropriation, in a general adjudication proceeding, for the water here involved.

From the foregoing it seems clearly apparent that the cases cited by plaintiffs, nor any one of them, upholds the contention now made, or depended upon facts similar to those now before us, and that, if no other authority were to be found, the question with which we are now dealing would be a new one in this jurisdiction.

We have, however, in this court, a case determined upon facts so similar that no controlling distinction can be drawn, and one which settles the question adversely to the contentions now made by plaintiffs. *McKelvey v. North Sterling Irr. Dist.*, 66 Colo. 11, 179 Pac. 872. It was decided En Banc, without dissent, the only Justice not participating being the one who had tried the case below and reached the same conclusion. The plaintiff was represented by counsel who now appear for the plaintiffs here. The cause was orally argued. The Justice who wrote the opinion also wrote the opinion in the Trowel case, and the Justice who wrote the opinion in the Comstock case, the Durkee case and the Rio Grande case, concurred therein. The action was for injunction. It was brought by the owners of the reservoir from which seepage escaped. They had been diligent in their effort to recapture the escaping water.

The water had never been used for the purpose of its original diversion. The Company had filed a map and statement which were construed as evidence of the appropriator's intent. All as in the instant case. The only apparently material difference being that McKelvey, claimant of the water through the construction of a drain ditch, was not a prior appropriator on the stream. This becomes immaterial in view of the fact that the reservoir owner brought the action and could succeed only on the basis of the validity of its own right. Had the law been as now contended by plaintiffs herein no relief could have been given the North Sterling Irrigation District in the McKelvey case.

An examination of the briefs of plaintiff in error in that case will show that the same question was involved, the same contention made, and the same authorities relied upon as in the instant case. There, as here, the storage rights of the Reservoir Company had not been adjudicated. It was contended there, as here, that the findings and decree of the lower court were under a misapprehension of law, and that the escaping water was tributary to the river and lost to the reservoir appropriator. The unmistakable conclusion of the court was that the owner of the reservoir, who took the water during the non-irrigating season (which water escaped before serving the purpose of its diversion) whose intent to recapture was made continually manifest, whose work of recapture was begun with promptness and prosecuted to completion with diligence, and who retook the water before it became the basis of another appropriation, was entitled thereto. To sustain the judgment in the instant case therefore requires no departure and involves no conflict; to reverse it, the rule laid down in *McKelvey v. North Sterling Irr. District, supra*, must be ignored. From this conclusion there seems to me no escape.

An affirmance of this judgment would enrich all prior appropriators on the river to the extent of thirty per cent of the water escaping from the Prewitt Reservoir, which

has not, and can not be recaptured, but has gone to supply their decrees. A reversal gives them now the other seventy per cent, upon which they have never depended, which they have spent no effort and no dollar to acquire, and which must be taken from a project rendered "economically untenable" by reason of the deprivation thereof. To do this a strict interpretation must be given to mere general statements and declarations in adjudicated cases never intended to apply to such a state of facts as that before us. Such a construction seems to me to do violence to the authorities and destroy a fundamental principle in irrigation law.

From territorial days down through our constitution, statutes, and all adjudicated cases, a single purpose has been kept constantly in view, and in times of doubt has been controlling—the necessity for the enactment of such legislation, and such a construction thereof, as would be a constant encouragement to irrigation development, to the initiation of new enterprises and the security of all rights established under those completed in the past. The affirmation of this judgment, and the declaration of the principle of law necessary thereto, can never be of the slightest disadvantage to vested rights, but its reversal, and the contrary declaration thereby necessitated, will, at least until relief has been furnished by further legislation, be a death blow to storage projects in the future. The threat becomes doubly ominous when we remember that the future of the state rests largely upon agricultural development, and this in turn upon irrigation by storage. The waters of the state have been so generally appropriated that the day of direct irrigation enterprises is closing, while that of storage has scarcely more than dawned. Seepage from practically all storage projects is so general, and ordinarily so extensive, that if the promoters thereof be told in advance that all such percolation is lost to them forever, that it may under no circumstances be recaptured, reclaimed, or conserved, save by the construction of absolutely impervious works, few men will have the hardihood to take the risks which

such a limitation imposes, and much of the good work done by this court in the past must be undone.

I think the only authority for this reversal is dictum and the only principle a departure, and that the judgment should be affirmed.

I am authorized to say that MR. JUSTICE DENISON concurs in this opinion.

No. 9979.

FLORA v. HOEFT.

Decided March 6, 1922. Rehearing denied May 1, 1922.

Action in damages for deceit. Judgment for plaintiff.

Reversed.

1. ACTIONS—*Deceit—Damages*. In an action for deceit, the damages recoverable are those which result directly and proximately from the deceit of which complaint is made.
2. DAMAGES—*Measure of—Instructions*. Instructions on the measure of damages in an action for deceit, reviewed and held erroneous.
3. PRINCIPAL AND AGENT—*Contract—Damages*. An unauthorized agreement made by an agent is not ground for the recovery of the benefits which would have been derived from the contract if it had been performed.

Error to the District Court of Sedgwick County, Hon. L. C. Stephenson, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Messrs. ROLFSON & HENDRICKS, Messrs ROPER & SHAW, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for damages. There was a verdict and judgment for plaintiff. Defendant brings the case here for review, and as a ground for reversal of the judgment contends that there was error in an instruction relating to the measure of damages.

The complaint alleges, in substance, that defendant falsely represented that he had authority from the owners to sell a certain tract of land, and thereby induced plaintiff to enter into a contract with defendant, as agent, for the purchase of the property; and, that in fact defendant had no authority from the owners, and they refuse to convey the land. Counsel for plaintiff insist, and the other side apparently concedes, that the allegations of the complaint, in a general way, correspond to those of the complaint involved in *Benjamin v. Mattler*, 3 Colo. App. 227, 32 Pac. 837. Of that case, the court there said:

"It is in the nature of an action on the case at common law for deceit. The nature of the action is plain and unmistakable."

It was further stated, in effect, that the action was not one based on contract or growing out of it. The instant case is likewise an action for damages for deceit.

It is elementary that the damages recoverable are those which result directly and proximately from the deceit complained of. 12 R. C. L. 451, 452. The instruction complained of permitted the jury to include in plaintiff's damages the value of the contract as it would have been had it been carried out, that is, if the owners had conveyed the land to plaintiff. In other words, plaintiff was allowed to recover such sum as would have represented the profits he would have derived from the contract if the owners of the land had adopted it and fulfilled it. This instruction clearly violated the rule above stated, and was erroneous. The plaintiff lost no bargain, and no profits, because of the defendant's alleged deceit, for he would not have had the same in the absence of such deceit. Plaintiff merely failed

to obtain the profits, but the failure was not due to defendant's representations. As reasoned in *Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788, 11 Am. St. Rep. 231, plaintiff was not prevented by defendant from negotiating with the owners or some authorized agent for the purchase of the property.

In *Tedder v. Riggin*, 65 Fla. 153, 61 So. 244, it was held that an unauthorized agreement made by an agent is not ground for the recovery of the benefits which would have been derived from the contract if the party the agent assumed to represent had performed.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER not participating.

No. 10,014.

SCOTT v. BROWN.

Decided March 6, 1922. No change in opinion on rehearing May 1, 1922.

Proceeding for the registration of land under the Torrens Act. Decree for petitioner.

Reversed.

1. REAL PROPERTY—*Contract Construed.* Contract between parties claiming an interest in land, in which "each consents with the other to be equal owners of said land", construed to be a conveyance each to the other of one half of his or her interest, and based on a good consideration.

2. *Conveyance.* No particular form of words or formality is necessary to pass the title to real estate.

Error to the District Court of Yuma County, Hon. L. C. Stephenson, Judge.

Messrs. MUNSON & MUNSON, for plaintiff in error.

Mr. JOHN F. MAIL, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

IN June, 1920, Clara E. Brown instituted proceedings under the Torrens Act in the district court of Yuma county for the registration of title to certain land. Scott answered among other things setting up the following contract:

"Idalia, Colorado, July 22, 1910.

This contract or agreement entered into by and between Clara E. Brown and Lincoln R. Scott is as follows:

Clara E. Brown holds a treasurer's deed to the N. W. $\frac{1}{4}$ of Sec. 22, Tp. No. 1 South of Range 45 West and Lincoln R. Scott is the owner of the original deed of trust executed by Russell W. Hartman on same tract of land and it is agreed that said Scott shall perfect the title to said land—either acquire the Hartman title or take case into Court and pay all expense to perfect the title and until Court Decree quieting title is obtained Miss Brown shall have all the crops raised on said land, keep up repairs of fence if any are needed and pay the taxes for any year on which she gets the entire crop.

That when title is perfected and from this date each consents with the other to be equal owners of said land and when land is sold the proceeds of sale of land shall be equally divided between Miss Brown the said Scott and no sale to be made without the approval of each party to this contract and all crops or rents after title is perfected to be equally divided till sale of land is made but all crops till

title is perfected or Court Decree is obtained belong wholly to Clara E. Brown.

(Signed) Clara E. Brown, (Seal)
Lincoln R. Scott. (Seal)"

The district court ordered the title registered in the petitioner, free from all claims of Scott. It should have been registered in her and Scott as tenants in common. The contract is not a mere contract to convey, it is, in effect, a conveyance each to the other of one-half his or her interest. No other interpretation can be given to the words "That when title is perfected and *from this date* each consents with the other to be *equal owners* of said land."

This is seen by supposing a deed between these parties with all formalities—the twelve parts of the deed of conveyance—whereby each, in consideration of the act of the other, grants, bargains, sells and conveys to the other the undivided one-half of his or her interest, whatsoever that may be. The net result of such a formal deed would be exactly what is expressed in the above quoted clause, "each consents with the other to be equal owners of said land." Nothing essential to a conveyance is lacking. No particular form of words or formality is necessary to pass the title to real estate. *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786; *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631; 18 C. J. 178-9. The intent manifested by the instrument controls. *Nicholson v. Dillabaugh*, 21 U. C., Q. B., 591, 594.

And when parties, having each some sort of claim to real estate, mutually agree that from thenceforth they shall be equal owners thereof it is hardly necessary to say that there is a good consideration from each to the other. Each has, to his own disadvantage, surrendered something and has done something that he was not bound to do, which, however, small, was accepted as a consideration by the other. *Kunkle v. Soule*, 68 Colo. 524, 190 Pac. 536, *Westesen v. Olathe State Bank*, 71 Colo. 102.

It is urged that there is no mutuality in this contract and that therefore specific performance cannot be granted; but there is no question of specific performance, and there-

fore no question of mutuality, because the contract amounts to a conveyance. Nevertheless, if it did not, there is mutuality here, because either of the parties could compel the other to perform his or her part of the agreement. We are not called upon to say what Scott's liability would be if he could not clear the title or failed to do so because his trust-deed was released, because, under this contract, he had a right to use Miss Brown's tax title for that purpose, and that, it seems from the result of this suit, was sufficient.

There is more plausibility in the point made by defendant in error that Scott has lost his rights by delay; but this point has no force, even if otherwise sound, if we are right in our construction of the contract.

It seems that the petitioner has mortgaged her interest. It does not appear whether the mortgagee is innocent of Scott's rights. As between Scott and the petitioner her interest only should be subject to this mortgage. The mortgagee should be protected as equity may require and the court should consider what in equity Scott should pay of the expense of this suit which perfects the title he is bound to perfect.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BURKE dissents.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER not participating.

No. 9973.

STUART v. CHANEY, ET AL.

Decided April 3, 1922. Petition for rehearing stricken May 1, 1922.

Action for sale, and distribution of proceeds of a trust estate. Demurrers to complaint and cross-complaint, sustained.

Reversed.

1. TRUSTS—*Equity*. The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity.
2. PLEADINGS—*Equitable Action*. Pleadings in an action for the sale and distribution of the proceeds of a trust estate reviewed and held to state a matter for the equitable cognizance of the court in the administration of a trust, and not subject to general demurrer.
3. TRUSTS—*Trustees—Personal Claim*. A trustee whose duty it is to sell, has no right to set up a personal claim, nor a breach of a contract between himself and others, as a reason for not performing his duty.
4. PLEADINGS—*Amendments*. Technical matters contained in pleadings may be corrected by amendment if necessary.
5. APPELLATE PRACTICE—*Rehearing*. An application for rehearing which is couched in intemperate and abusive language, stricken from the files.

Error to the District Court of Boulder County, Hon. Neil F. Graham, Judge.

Mr. THOMAS B. STUART, *Pro se*.

Mr. CHARLES A. MURRAY, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

STUART and Murray are the surviving directors of a corporation whose charter expired when they and one Miller were directors. Miller has since died, thus they, under the statute, are trustees of the corporate estate. Murray and other persons who are stockholders brought suit against Stuart, alleging that the property could not be divided, asking for partition, for sale and distribution of the proceeds. Stuart filed a cross-bill, setting up the same facts and added that Murray had converted certain money and property of the company and was otherwise indebted to it, and that by reason thereof defendants Murray, Chaney and Baldwin are indebted to him, stating that an agreement had been reached between the stockholders for a sale and disposition of the proceeds which Murray refused to carry out, and praying for an account.

A demurrer to this cross-complaint was sustained, apparently on the ground that it was an attempt on Stuart's part to inject his personal claims against Murray and others into the case. A demurrer to the complaint was also sustained; the complaint was amended by setting up certain facts including a statement that the trustees were unable to agree and therefore could not sell. A demurrer to the complaint as amended was sustained. Stuart brings error, claiming that the demurrer to his cross-complaint was erroneously sustained; Murray et al. assign cross-error, claiming that the order sustaining the demurrer to the amended complaint was erroneous.

The case is a simple one; the difficulties have arisen because the elementary principles which govern it have been overlooked. "The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity." 21 C. J. 116; *Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183. When, therefore, the two trustees were unable to agree the proper course was to go to equity to have the trust administered.

The original complaint contains all the facts necessary to this end except the fact that the trustees could not agree. That was supplied by the amendment. The amended com-

plaint therefore stated a case of equitable cognizance and the demurrer thereto should not have been sustained.

The duty of these trustees, of course, was to dispose of the property and distribute the proceeds. The bill should be regarded as a bill to compel the performance of this duty. The confusion about it could scarcely have occurred if the word "partition" had been left out of it, but the word is unimportant; the substance of the bill is sufficient for sale and distribution.

The cross-complaint by Stuart stated that Murray, the other trustee, had converted trust property and was otherwise indebted to the trust estate. When the court takes up the administration of the trust, both the trustees must account to the trust estate. It was, then, the duty of the defendant trustee to call this matter to the court's attention, whether by cross-complaint or answer—it is immaterial what we call it, and the cross-complaint, therefore, stated a matter for the equitable cognizance of the court in the administration of the trust and a general demurrer to it cannot stand.

There is a claim that the cross-bill improperly joins causes of action and that it is ambiguous, unintelligible and uncertain. As to the first claim, it shows but one cause, if any, and insofar as its statements justifying an accounting by Murray are concerned, it is neither ambiguous, unintelligible nor uncertain. The remainder may be regarded as surplusage. With reference to the contract and the allegations connected with it, it is enough to say that a trustee whose duty it is to sell has no right to make any concession to him personally a condition of his consent to a sale or to set up a breach of contract between himself and others as a reason for not performing his duty, and, contract or no contract, the trustees must sell for the best price that they can get, and distribute; for that reason if for no other the allegations concerning the contract are immaterial. It is hardly necessary to say that an accounting in this matter must be only of dues to and from the trust (or the corporation, its equivalent) and that the distribu-

tion must be to creditors and stockholders only.

Something was said in argument about the capacity in which Murray sued and Stuart filed his cross-complaint; whether as trustee or personally. Such technical matters may be corrected by amendment if necessary. *Deutsch v. Baxter*, 9 Colo. App. 58, 47 Pac. 405. The necessary action in this matter should not be delayed on that account.

It is evident that the great need of this trust is intelligent, harmonious and immediate action. Such may be obtained by a receiver or the removal of the trustees and the appointment of another trustee, or perhaps some other method—we will not hamper the court by specific directions.

The case is reversed with directions to overrule the demurrers to the amended complaint and cross-complaint and to take further proceedings not inconsistent herewith.

MR. CHIEF JUSTICE SCOTT not participating.

Note. Application for rehearing by plaintiff in error stricken from the files because couched in intemperate and abusive language. Mr. Justice Denison did not participate in the consideration of this application.

No. 10,003.

EMPSON v. THE AETNA CASUALTY & SURETY CO., ET AL.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action on bond. Judgment for defendant.

Affirmed.

On Petition for Rehearing.

1. ~~APPEAL AND ERROR~~—Questions not raised below. Error based upon

proceedings to which no objection was made in the court below, will not be considered on review.

2. **BOND—Liability of Surety.** A surety cannot be bound on a contract radically different from that, to secure the execution of which, it has executed a bond, where the new contract is made without its knowledge or consent.
3. **APPEAL AND ERROR—Conflicting Evidence.** A verdict on conflicting evidence is conclusive on review.

Error to the District Court of Boulder County, Hon. George H. Bradfield, Judge.

Messrs. PERSHING, NYE, FRY & TALLMADGE, Mr. ROBERT G. BOSWORTH, for plaintiff in error.

Messrs. RINN & ARCHIBALD, Messrs. SMITH, BROCK & FERGUSON, Mr. JOHN P. AKOLT, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error brought suit against defendant in error, The Aetna Casualty and Surety Company, on a bond in which the interveners were principals, given to secure the performance of a construction contract between the interveners and the plaintiff in error. By this contract the interveners were engaged to construct an irrigation ditch for the plaintiff in error. It was to be constructed according to attached specifications and under the supervision of an engineer, who was, as is usual in such contracts, made the umpire in case of any dispute as to the work, and the judge as to the quality and quantity of work done under the contract.

Before the work had progressed very far the interveners, as they allege because of the difficulty of obtaining workmen during the late war, thought best to turn the work over to plaintiff to complete; and upon consultation with the engineer in charge, and with his advice, prepared a notice to the plaintiff to that effect, which was duly sent to him.

Thereupon the engineer served upon the contractors and

upon the Surety Company, a notice that unless the work were speeded up within five days, and performed in accordance with the contract, he would take such action as under the contract he might deem necessary on behalf of Empson; all as provided by the contract.

Thereafter, Empson with the written consent of the interveners, entered into a contract with one Mason to complete a part of said ditch on substantially the terms of the original contract. About this time a contract was made with one Walker to complete the other part of the ditch, the men employed to be paid by the day, provision being made for paying him for superintendence, for the use of teams, equipment, etc. This action is to recover from the surety on the bond the excess cost on the Walker contract above the cost, as per the original contract. The cost of the part of the ditch constructed by Walker was \$5600 in excess of the contract price for the whole work.

The interveners alleged in their petition, not only that they were interested as principals on the bond, and liable over to the surety in case of judgment against it, but that, in consideration of their turning over the work to the plaintiff for completion, he had promised that they should receive a named sum for the work they had already done.

At the close of the plaintiff's case, a motion for a non-suit in favor of the defendant surety company was sustained, and the case proceeded to verdict on the petition and answer in intervention. The interveners had judgment for a part of the sum they claimed, and plaintiff brings error.

Counsel for plaintiff in error contend that the court erred in allowing the contractors to intervene, but as an answer was filed to the petition, and no objection appears to have been made in the trial court, we do not consider this question. We may say, however, that from the allegations of the petition, and the facts as they appear in the record, the intervention was entirely proper.

Which of the several grounds set out in the motion for a non-suit the court acted upon, does not appear; but one

of said grounds is manifestly sufficient to support the ruling. As above stated, the engineer in charge of the work was given broad authority in regard to it, and the contract provided, among other things, that in case of a default by the contractors in the performance of their agreement, the engineer, after due notice given the contractors, should have full power to employ, or to direct the employment of, such force of men, teams, appliances, etc., as he might deem necessary to complete the work satisfactorily within the time specified; and to pay all persons so employed and expenses incurred, deducting the amount so paid from any sum due or to become due to the contractors.

The contract with Walker, to which it does not appear that the interveners consented, ignored this provision of the contract, and, in terms, put Walker in full charge of the work, giving him a per diem, and his foreman a monthly wage, with no reference whatever to an engineer. It should be said here that Walker was not an engineer. The evidence shows that the engineer had, in fact, no supervision of the work, and paid no attention to it until called upon to make the final estimate of work done. In such contracts it is common to make the engineer in charge of the work an arbiter between the parties, and it may reasonably be presumed that the contractors consented to this part of the contract in reliance upon the technical skill of engineers, as a class, and upon the further fact that an engineer in charge of the work would ordinarily have no pecuniary interest in having it prolonged, or done at an unfair rate. To put the work in charge of one who profited by every delay in its completion, and with no limit of time or cost, was a thing very far from that to which the contractors had agreed. The surety must be supposed to have been moved by the same consideration as those which moved the contractors in the matter above mentioned; and it cannot be bound as surety on a contract radically different from that which it executed. Though defendant is a surety for hire, it is entitled to have its contracts construed according to the plain meaning of their terms. Moreover, the

surety is not shown to have had notice of the making of the Walker contract, and so far as appears, no opportunity was given it to make objection to it.

We find nothing in the record to justify counsel's statement that the Surety Company was aware of all that was done under the Walker contract. Upon the facts in evidence a non-suit was proper.

After the entry of the order of non-suit, plaintiff made no objection to the trial of the issue made by the petition in intervention and the answer thereto. A great part of the briefs is devoted to the discussion of the intervention, but for the reasons above mentioned, we are not called upon to consider that question.

Upon the question of an agreement by plaintiff to pay interveners for the work already done, as well as upon questions growing out of the Walker contract, there is a strong conflict of evidence. Whether the jury found for the interveners upon the ground that a promise of payment had been made, as alleged in the petition, or upon the ground that the work done by Walker should have been done at a cost which would have left the interveners a profit, cannot be determined. In any event, we are concluded by the verdict.

The errors assigned on the giving and the refusing of instructions not having been argued, will not be considered.

As the record discloses no reversible error, the judgment is affirmed.

MR. JUSTICE DENISON dissents.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,023.

WOODWARD v. MCGRAW.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action for damages resulting from an automobile accident. Judgment for defendant.

Affirmed.

1. LAST CLEAR CHANCE—*Instruction.* In an action for damages occasioned by an automobile accident, no contributory negligence being shown and the evidence failing to disclose any negligence on the part of the defendant after he saw the danger into which plaintiff had thrust herself, a requested instruction on last clear chance, was properly refused.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

MR. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOLE, Mr. FRANCIS G. RICHEY, Mr. EDWARD C. STIMSON, for plaintiff in error.

MR. W. D. WRIGHT, Mr. W. D. WRIGHT, JR., for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE plaintiff in error, Jessie Woodward, brought suit against defendant in error for damages for negligently hitting her with his automobile. The verdict was for defendant. The only error relied on is the refusal of the court to give an instruction on last clear chance.

We think the refusal was right. The evidence does not call for such an instruction.

The evidence for plaintiff is that she was walking west-

erly across Fourteenth street on the southerly side of Glen-arm street, when the defendant, coming northerly on Fourteenth street, though there was plenty of room to go behind her, swerved to the left out of his direct course, and, though she raised her hand in warning, struck her and her companion, near the middle of Fourteenth street. There is no room here for the doctrine of last clear chance because there was no contributory negligence.

The evidence for defendant is that he saw the plaintiff and her companion leave the curb, slowed his car and intended to go behind them; that when he was very near they turned back toward the curb, that thereupon he put on his brake and swerved to the left when they again turned to the west and in front of him and that he stopped just as he reached them. There is nothing here to justify the instruction, because this evidence shows no negligence on defendant's part after he saw the danger into which plaintiff had thrust herself; on the contrary the undisputed evidence is that as soon as he saw her peril or could have seen it he turned and put on the brake, and nothing more is suggested that he might have done to avoid the accident.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,032.

TROUTMAN, ADMINISTRATOR v. SHERIDAN.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action involving a claim against an estate. Judgment for claimant.

Reversed.

1. **PRINCIPAL AND AGENT**—*Scope of Agency.* An offer by a farm manager of a special inducement to one of his hands to enter the military service, is not within the scope of his agency, and in the absence of ratification is not binding upon the principal.

Error to the County Court of the City and County of Denver, Hon. Ira C. Rothgerber, Judge.

Mr. E. C. STIMSON, Mr. PAGE M. BRERETON, for plaintiff in error.

Messrs. DAWSON & WRIGHT, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

IN June 1916, J. H. Troutman (since deceased) owned a farm in Fremont County, his son P. H. Troutman (now administrator of his estate and as such, plaintiff in error herein) was his general agent for the operation thereof, and Sheridan, defendant in error, was employed thereon. While so employed said Sheridan was solicited to enter the military service and Troutman Jr., assuming to represent deceased, offered him some special inducement to enlist, which offer was accepted. Plaintiff in error says said inducement was the difference between Sheridan's farm wages and his military pay. If so the obligation has been more than discharged. Defendant in error says the in-

ducement was \$20.00 per month while in the military service. If so there is due a balance of \$340.00 and interest. For that amount Sheridan filed his claim against decedent's estate. The cause was tried to a jury, motion for non-suit overruled, verdict and judgment for claimant; and the administrator brings error.

The offer by a farm manager of a special inducement to one of his hands to leave his employment and enter the military service can, by no process of reasoning, be brought within the scope of the manager's agency. However praiseworthy as an act of patriotism, it is no more binding upon the principal than would be the agent's sale of the property in his charge to supply the needs of the government. That it redounded to the credit, and eventually to the profit, of the principal is no more potent to bring it under cover of the agency than would the same considerations applied to the financing of an oil well in the vicinity. The act in question binds the estate only in so far as it was ratified by decedent. Aside from such ratification it is wholly immaterial what contract, if any, the agent made with Sheridan.

The sole evidence of ratification is given by plaintiff in error. He says the only report of his action made to his principal was of a proposition "to make up the difference between the amount paid at the ranch * * * to the men and the amount they would receive in the army, whatever that was." This action deceased ratified, nothing more. His words were, "I am glad to make him whole, so that he will not lose anything while in the service." Action and ratification are unambiguous; explanation and construction are foreclosed.

The motion for non-suit should have been sustained. The judgment is reversed with directions to enter judgment for plaintiff in error.

MR. JUSTICE BAILEY sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE TELLER not participating.

No. 10,048.

SWITZER v. ANTHONY, ET AL.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action for libel. Judgment for defendants.

Affirmed in part—Reversed in part.

1. **LIBEL—Pleading—Variance.** In an action for libel, the gravamen of the charge is the publication, and an additional allegation that the defendants conspired together does not affect the sufficiency of the complaint, and the failure to prove the conspiracy does not constitute a variance.
2. **Mis-nomer—Identification.** Where in an action for libel, the name of the plaintiff was mis-spelled in the alleged libelous article, it is for the jury to say whether there was a sufficiently accurate description to identify the plaintiff, and whether the defamatory matter was published of and concerning her.
3. **Intent.** In an action for libel, it is not necessary that the defendant should have known and intended to defame the plaintiff. Intent is immaterial except as a part of express malice.
4. **Malice—Evidence.** Lack of direct evidence of malice alone will not always defeat an action for libel. Where the libelous words are actionable *per se*, malice sufficient to sustain a judgment is presumed.
5. **Words libelous per se.** The charge that plaintiff called the American flag "a dirty rag", is libelous *per se*.
6. **Indirect Charge.** Where the libelous article states that the plaintiff had been accused of referring to the American flag as a dirty rag, the effect is the same as though the charge had been made direct.
7. **Privileged Publication.** The publication of a legal proceeding is qualifiedly privileged, but not until it has gone into court and thereby become public. Moreover, the qualified privilege permits only the publication of a truthful statement.

8. *Damages—Proof.* The fact that no damage is proven in an action for libel, is immaterial, on motion for a directed verdict, where the case is one of libel *per se*.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. DUNCAN MCPHAIL, for plaintiff in error.

Mr. WAYNE C. WILLIAMS, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE plaintiff in error brought suit for libel against Caroline M. Anthony and the Denver Express Publishing Company, publisher of the newspaper, the Denver Express. The complaint alleged that the defendants conspired to publish and did publish the following:

"Insult the Flag, Woman Says, so She'll Avenge It."

"Mrs. Ellen Switcher, 2936 W. 3rd av. (meaning the plaintiff herein) called the American flag a 'dirty rag,' according to Mrs. Caroline M. Anthony, a neighbor. Mrs. Anthony's forbears were pioneer American settlers and she immediately protested against the insult to the flag. Then she claims Duncan McPhail, an attorney, got into the argument and sided with Mrs. Switcher (meaning the plaintiff herein). So Mrs. Anthony Wednesday asked the district attorney's office to have the two deported as 'undesirable aliens.' She was referred to the commissioner of immigration. 'If he doesn't deport them, I'll take the matter into my own hands and avenge the flag,' said Mrs. Anthony."

On trial, after evidence on both sides, the court directed verdicts for the defendants.

The material facts are as follows, and are undisputed:

Mrs. Anthony complained to the deputy district attorney of some misconduct of the plaintiff, Mrs. Switzer, and at the same time said that another woman had referred to the American flag as a "dirty rag." A reporter, in writing

the story for the Express, got his wires crossed and put Mrs. Switzer in the other woman's place. Neither he nor anybody in connection with the newspaper knew the plaintiff or anything about her, or had any wish to defame her.

Mrs. Anthony was shown to have had nothing to do with the libel, and was properly discharged.

We are forced to the conclusion that the direction of the verdict for the defendant, The Express Publishing Company, was erroneous. The court stated the following reasons for its action: 1st. That no conspiracy had been shown as alleged in the complaint; 2nd. That the article referred to one Ellen Switcher and was in no way connected with Ellen Switzer; 3rd. That no malice or want of good faith had been shown; 4th. That the plaintiff was not the person libeled; 5th. That the complaint did not state facts sufficient to constitute a cause of action; 6th. That the statute defined libel as malicious defamation; 7th. That the matter is one of qualified privilege.

Counsel for the defendant in error adds to this that no damage was shown.

As to the first ground: the allegations are that the defendant Anthony "did convey and deliver" to the defendant corporation the libelous matter and that "said defendants did contrive and conspire together * * * and did print, publish and circulate of and concerning" plaintiff the matter above set forth.

The gravamen of this charge is, of course, the publication, and the allegation that the defendants did or did not conspire does not affect the sufficiency of the complaint and the failure to prove it does not constitute a variance, therefore the first reason given by the court was unsound. Under the old practice the rule might have been otherwise, but under our code one can see no reason for declaring a variance when the real gravamen has been proved. Code 1908, sec. 84.

As to the second point, that the article referred to Ellen Switcher and not Ellen Switzer; the court might have added that it described her as residing at 2936 West 3rd

avenue, when in fact she resided at 2905 West 2nd avenue, but the evidence was that there was no such number as 2936 W. 3rd avenue, and no such person known as Ellen Switcher, and one witness testified that while she knew plaintiff and that the proper spelling of her name was Ellen Switzer, she (the witness) pronounced it "Switcher." The plaintiff herself testified that because of the odium of the charge she was subjected to insult. These things tended to show and would justify the jury in finding that there was an accurate enough description in the alleged libel to identify the plaintiff and that it did identify her and therefore it was for the jury to say whether the defamatory matter was spoken of and concerning the plaintiff, because it was for them to determine what the article meant. *Republican Publishing Company v. Miner*, 12 Colo. 77, 86, 20 Pac. 345.

In this connection it should be remembered that the fact that neither the reporter nor anybody else connected with the newspaper knew the plaintiff, is immaterial to the right to recover. It is not necessary that they should have known her and have intended to defame her. Upon this point we cannot agree with the case of *Hanson v. Globe Newspaper Company*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856, or with counsel's interpretation of *Butler v. News-Leader Co.*, 104 Va. 1, 51 S. E. 213. The dissenting opinion in *Hanson v. Globe Company* in our judgment, states the correct law. Intent is immaterial except as a part of express malice.

The 3rd point, that the plaintiff had shown no malice or want of good faith, is annulled by *Meeker v. Post Pub. Co.*, 55 Colo. 355, 359, 135 Pac. 457, Ann. Cas. 1915A, 126. Lack of direct evidence of malice alone does not always defeat an action for libel. For words actionable *per se*, malice sufficient to sustain a judgment is presumed. *Rocky Mountain News v. Fridborn*, 46 Colo. 440, 446-7, 104 Pac. 956, 24 L. R. A. (N. S.) 891. In this connection see *Republican Pub. Co. v. Mosman*, 15 Colo. 399; *Republican Pub. Co. v. Miner*, *supra*.

The 4th reason, that the plaintiff was not the person libeled, is, in substance, the same as the second.

In the 5th ground, that the complaint does not state facts sufficient to constitute a cause of action, we cannot agree with the court below. The complaint alleges, with proper innuendoes, that the article was published of and concerning the plaintiff, (Code 1908, sec. 74,) and if the article be considered as a statement that the plaintiff called the American flag a dirty rag, it is, we think, libelous *per se*, because, if believed, it was certain to bring upon the plaintiff the contempt and hatred of the community in which she lived, especially in times of patriotic excitement such as prevailed in the fall of 1916, when this publication was made. It is true that the article does not say that Mrs. Switzer did so refer to the flag but only that Mrs. Anthony had accused her thereof; but it is the same as if the charge had been directly made. *Meeker v. Post Pub. Co.*, 55 Colo. 355-7-8, 135 Pac. 457, Ann. Cas. 1915A, 126; *Republican Publishing Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485; *Morse v. Times-Republican Printing Co.*, 124 Iowa, 707, 100 N. W. 867; *Bishop v. Journal Newspaper Co.*, 168 Mass. 327, 47 N. E. 119. See also the authorities cited in 55 Colo. 358, 135 Pac. 458, Ann. Cas. 1915A, 128.

The 6th point, in substance, is the same as the third.

The 7th reason, that the matter is one of qualified privilege, cannot be sustained. The publication of a legal proceeding is qualifiedly privileged, but not until it has gone into court and thereby become public. *Meeker v. Post Pub. Co. supra*. See also *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439, 61 So. 345. Moreover the qualified privilege permits only the publication of a truthful statement of the matter as it took place in the court. The defendant cannot claim a qualified privilege to say that one has been accused in a legal proceeding when he has not, so even if statements to the district attorney were qualifiedly privileged, the publication of the accusation made of another as having been made of the plaintiff would not be within the privilege.

The fact that no damage was proved, the case being one of libel *per se*, is immaterial. *Republican Publishing Co. v. Miner*, 12 Colo. 86, 20 Pac. 345.

The judgment is affirmed as to the defendant, Anthony. As to the defendant, The Denver Express Publishing Company, it is reversed and remanded.

MR. JUSTICE SCOTT not participating.

No. 10,070.

MANBY v. HIBBARD.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action for breach of contract. Judgment for defendant.

Affirmed.

1. **CONTRACT—Modification.** Record reviewed and held not to establish that there was any binding contract for the modification of an agreement for the purchase and sale of sheep.
2. **PRINCIPAL AND AGENT—Ratification.** The contention that there was any agency and a ratification of the acts of the alleged agent by the principal under the facts of this case, overruled.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. S. HARRISON WHITE, Mr. W. B. MORGAN, for plaintiff in error.

Messrs. JOHNSON & JOHNSON, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFF, Manby, brought this action for damages on account of an alleged breach of contract by defendant, Hibbard, wherein the latter agreed to purchase from Manby five thousand Utah Sheep. Judgment was for defendant upon a counterclaim for five thousand dollars paid in advance upon the purchase price of the Utah sheep, which Manby had been unable to deliver under the original contract. This judgment is now here for review on error.

The following is a copy of the original contract:

"Contract, Between J. B. Manby and Mart O. Hibbard, March 3, 1920; that for \$5,000.00 consideration, received, Manby agrees to sell, and Hibbard to buy 5,000 head of yearling ewes, to average 58 lbs in Southern Utah. Price \$12.50 a head. The \$5,000.00 to be part of purchase price, and balance on delivery, f. o. b. cars, at Modena, U. between April 5 and 10, 1920, healthy and free from disease, none crippled, loomed or injured. Manby warrants title, free of incumbrance."

The agreement was reached by the parties themselves without outside intervention. It is claimed by plaintiff that subsequently the agreement was modified so as to provide for the sale of Oregon sheep, to be delivered on board cars there. That this modified contract was arranged through an agent and later ratified by Hibbard. However, it seems that Hibbard declined to accept the Oregon sheep, which refusal is the basis of the supposed breach and alleged damages.

It appears that the parties were brought together upon the first contract by one Harry R. Wood, a Denver live stock salesman. When plaintiff was unable, as provided in the original contract, to make delivery of the Utah sheep, he sent this telegram to defendant:

"Denver, Colo., March 31, 1920.

"Mart O. Hibbard,

"Buffalo, Wyoming.

"Utah parties fell down on yearling ewe deal. I will furnish you two thousand April 15th, f. o. b. Condon, Oregon, and three thousand May 1st, f. o. b. Heppner, Oregon.

These yearling ewes will weigh over sixty-five pounds and shear over eight pounds.

"J. B. Manby."

No answer was ever made thereto by Hibbard. However, on April 9th, Wood, the man who had been instrumental in bringing about the original contract, sent the following telegram to Manby, but upon what authorization does not appear:

"Can we arrange for Hibbard to receive both shipments at once, answer."

Manby replied:

"Hibbard must be here 13th, can't delay this shipment."

Wood responded with the following:

"Hibbard will be there. Arrange to receive second shipment soon as possible. Have you anything that is not sold?"

Later Wood sent the following:

"My man will be in Arlington today for Hibbard sheep."

It appears that Hibbard did send a man to Oregon to receive two thousand of the five thousand Oregon sheep, but owing to the fact that Manby declined to deduct the five thousand dollars paid under the original contract for Utah sheep from the price of the first two thousand Oregon ewes, Hibbard's man refused to accept them. It also appears that Manby did not in fact own any sheep in Oregon, but simply held options, and was dependent upon the money coming from Hibbard to pay the balance of the purchase price therefor, before he could deliver at all.

There are several assignments of error argued, but the matter which is determinative of the case is that the record fails to establish that there was any binding contract on Hibbard for a modification of the original agreement. In this connection it is to be noted that in making the original agreement both parties acted for themselves. Wood was agent for neither, and was without authority to conclude a deal. There is nothing in the telegrams relied upon by Manby which establish agency in Wood, as to the proposed Oregon deal. It is urged, however, that Hibbard by his

subsequent conduct ratified the acts of Wood in this behalf. What Hibbard did was to send his man to Oregon to receive two thousand sheep, if the five thousand dollars originally paid Manby were deducted from the purchase price thereof. Owing to the fact that Manby in reality owned no sheep in Oregon, or elsewhere, for that matter, he could not agree to these terms, and evidently was in no position to carry out the proposed Oregon deal. This is clearly apparent from a careful examination of the whole record. The man sent by Hibbard to Oregon had no authority to do anything except as instructed in writing. These instructions were that he was to receive two thousand sheep, if Manby would deduct the money already paid on the original contract for Utah sheep from the purchase price of the two thousand Oregon sheep. There was no attempt upon the part of Manby, through the Oregon deal, to in effect fulfill the Utah contract. Apparently Hibbard saw a chance to at least recoup part of his losses, through Manby's breach of the first contract by a new arrangement for the Oregon sheep, which proposition Manby quite evidently was never in position to carry out. We conclude this from a full examination of all the record facts.

There is no theory upon which Manby can or ought to recover. Even if Wood was the agent of Hibbard no specific and binding contract by him is shown to have been made for the purchase of the Oregon sheep. However, there is nothing in the record to satisfactorily establish such agency. Upon full consideration it appears that exact justice will only be done when Manby has refunded to Hibbard the \$5,000.00 which the latter paid on the original contract, with interest and costs. The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

MR. JUSTICE DENISON specially concurring.

I do not agree that there was no contract for the pur-

chase of the Oregon sheep; but it was essential to the plaintiff's case that he show himself ready to deliver 2000 sheep f. o. b. Condon, April 15th and his evidence showed he was not. The judgment was therefore right.

No. 10,118.

SCOTT v. GREGORY.

Decided April, 3, 1922. Rehearing denied May 1, 1922.

Action in debt, and for subrogation. Judgment for plaintiff.

Affirmed.

1. FRAUD—*Real Property*. Record reviewed and the transaction, concerning real property, held fraudulent and collusive on the part of defendants, and the decree entered in favor of plaintiff upheld.
2. SUBROGATION—*Doctrine*. The doctrine of subrogation is one of equity and benevolence, and its object is the prevention of injustice.

The doctrine held applicable to the case under consideration.

Error to the District Court of Yuma County, Hon. L. C. Stephenson, Judge.

Mr. JOHN T. BOTTOM, for plaintiff in error.

Messrs. ALLEN & WEBSTER, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

SUIT was by James W. Gregory, defendant in error, against Minnie K. Scott and others, to recover \$1,377.10

from certain of the defendants, and for subrogation to the rights of Lincoln R. Scott, as mortgagee, under two second mortgages on real estate in Yuma County. Findings and decree were for Gregory according to the prayer of his complaint. Minnie K. Scott brings error.

It appears that in 1913, John C. Kness, one of the defendants, was indebted to Lincoln R. Scott in the sum of \$1,200.00, which was secured by chattel mortgage. Kness at that time owned the northwest quarter of section 23, township 5, south, range 47 west, in Yuma County. His wife, Jeanette E. Kness, another of the defendants, owned the southwest quarter of section 24, same township and range. Gregory purchased from Kness the land in section 23.

To secure Scott in his loan to Kness the latter with his wife executed two notes to Scott for \$600.00 each. Gregory and his wife signed these notes as sureties. A single mortgage securing the payment of the notes was executed jointly, on the two quarters of land above described, by the makers of the notes. The land conveyed by Gregory was incumbered by a first mortgage, amounting, as Gregory then supposed, to about \$1,000.00. The other quarter, belonging to Mrs. Kness, for about \$500.00.

The notes were what are known as judgment notes and on February 3, 1916, Scott took judgment without notice, against all the makers. Gregory did not learn of this until about a year later, when he was about to dispose of some of his property and found that a transcript of said judgment had been duly recorded. He had in the meantime also ascertained that the amount of the first mortgage on the quarter which he had bought of Kness, including interest and taxes, amounted to approximately \$1,500.00, instead of \$1,000.00, and he conveyed the same back as of no value above incumbrances. Later the land in section 24, owned by Mrs. Kness, was conveyed by her to Minnie K. Scott, wife of the holder of the second mortgage, subject expressly, however, to both the first and second mortgages. For this transfer there was ostensibly a consideration of

\$500.00, but in fact the record shows that Mrs. Kness actually realized little or nothing from the transaction.

Gregory then made the further discovery that Scott had obtained permission from the County Court in Denver to withdraw from the files the notes and mortgage upon which he had secured his judgment. Gregory then moved an order requiring the return of these documents so that he could become permanently possessed of them, and so safely pay the judgment. On February 14, 1917, Scott, Gregory and their respective attorneys agreed among themselves that Scott should within three days from that date return all these papers to the files of the court for Gregory's use, protection and security.

It appears that on the very date of this agreement Scott released to his wife the land standing in her name from the lien of the second mortgage. The release was made, as is admitted, for a consideration of \$1.00 only. On February 15th, 1917, the attorneys for Gregory secured an abstract of title duly certified to the land covered by such mortgage, which disclosed that on that date the lien was still in full force and effect. Scott failed to keep his agreement for a prompt return of the papers to the court, and did not replace them until February 20, 1917, on which latter date Gregory made payment. On the same day the release to his wife of the second mortgage was recorded by Scott.

This suit was then brought by Gregory for the relief indicated above. The decree was for a personal judgment against Kness, he having admitted the complaint to be true. Lydia Gregory was dismissed from the cause, having no interest. The decree also cancelled the release by Scott of the land conveyed by Jeanette E. Kness to Minnie K. Scott, and directed that all land subject to the mortgage, including the quarter held by Mrs. Scott, be sold to satisfy the judgment Gregory had paid.

The only matter worthy of any consideration is the alleged defense of Mrs. Scott that she took the quitclaim from Mrs. Kness as an innocent party, and knew nothing

of the transactions of her husband with the other parties, and paid him \$1.00 for a release of the mortgage as a valid, binding and sufficient consideration. The claim that she took the land in good faith without notice is refuted by the transaction itself. She secured the release from her husband and for the trifling consideration of \$1.00. These facts alone are sufficient to cast suspicion upon and condemn the acts of the Scotts. In addition Mrs. Kness testified that Mrs. Scott knew the facts affecting title and of the judgment against Gregory, and that the Scotts had planned to force Gregory to pay the same and then release the Scott quarter from the lien of the second mortgage. That the whole matter of this release is fraudulent and collusive is beyond peradventure. No other conclusion is possible. The trial court could not have reasonably found anything other than that Mrs. Scott had full notice of all the facts and that her land should be held to respond to the just claim of Gregory. It is largely a fact question, anyhow, and these were all very properly resolved by the trial judge adversely to the contentions of Mrs. Scott.

Some technical defenses are raised and argued by plaintiff in error against Gregory's claim to the right of subrogation, but if it is true as was said in *Leavenworth v. Brendel*, 63 Colo. 563, at page 567, 167 Pac. 966, that "The doctrine of subrogation is one of equity and benevolence, and its object is the prevention of injustice," it would be difficult to discover a state of facts which more urgently call for its application than those here involved.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,183.

McCLELLAN v. MORRIS, ET AL.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action involving a real estate transaction and promissory notes in connection therewith. Judgment for plaintiff.

Reversed.

On Application for Supersedeas.

1. **REAL PROPERTY—Breach of Warranty—Encumbrances.** As a general rule, in an action of covenant for breach of warranty against encumbrances, a knowledge of the encumbrance on the part of the vendee does not constitute a defense; but when it appears that the vendee has assumed the removal of such encumbrance, the rule does not apply.
2. **BILLS AND NOTES—Promissory Note—Infirmities—Knowledge.** If a note is taken by endorsement under circumstances which impute knowledge of infirmities in it, so that the taking of it amounts to bad faith, the transferee is not a holder in due course.
3. **Negotiable Instruments Act.** Sections of the negotiable instruments act, chapter 95, R. S. 1908, reviewed and applied.
4. **Negotiable Paper—Title—Agency.** One having possession of negotiable paper has prima facie title thereto; but that title may be defeated or overcome by evidence that the note is held as an agent.

If the agency permits the agent to receive the proceeds without limitations as to their application, one taking the note need not follow the proceeds; but if the agency of the party is made to appear, the principal will not be bound beyond the authority given.

Where the holder has notice that the party acting as agent is such, he is bound to inquire into his authority.

5. **PRINCIPAL AND AGENT—*Scope of Authority.*** A principal may confer such authority on his agent as he desires, and impose such limitations and restrictions as he may deem proper, and these are binding upon third persons with notice, if not waived by the principal.

If the limitation of the agent's authority is known to the person with whom he deals, the principal will not be bound if the agent exceeds his authority.

6. ***Duty of agent.*** It is implied in every agency, in the absence of express evidence to the contrary, that the power of the agent is to be exercised for the benefit of the principal and not for his own private advantage.
7. **PRACTICE AND PROCEDURE—*Petition.*** A petition or motion filed in a cause is sufficient to bring the matter before the court.
8. **APPEAL AND ERROR—*Final Determination.*** Where all the evidence is before the court of review and the questions involved fully presented, the reviewing court may determine the cause upon its merits.

Error to the District Court of Weld County, Hon. Neil F. Graham, Judge.

Mr. ERNEST MORRIS, Mr. JOHN C. NIXON, for plaintiff in error.

Mr. J. C. EWING, Mr. WORTH ALLEN, Mr. E. H. HOUTCHENS, Mr. WILLIAM A. HILL, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error, Achziger, was plaintiff in an action in which the plaintiff in error and the defendants in error, other than Achziger, were defendants. The suit grew out of the following state of facts.

Plaintiff in error, McClellan, was the owner of a tract of farm lands near Greeley, Colorado. Achziger had been a tenant on the land of McClellan for a number of years, and was desirous of purchasing from McClellan one hundred and twenty-four acres of land, but had no funds with which to make a cash payment. McClellan's lands were

encumbered by a mortgage of \$6500, held by a company in Colorado Springs, and by a mortgage of about \$4000. held by the Sanborn estate of Greeley.

Achziger and McClellan entered into a contract by which one hundred and twenty-four acres of the McClellan land were to be deeded to Achziger, who was to encumber the same by deed of trust to secure a \$6500 note, the proceeds of which were to be used to pay off the existing \$6500. encumbrance, and by a second encumbrance to McClellan for \$8500, the balance of the purchase price. McClellan was to encumber the remainder of the land by deed of trust, to secure a note of \$10,000, out of the proceeds of which he was to pay off the Sanborn indebtedness. In pursuance of this plan, they arranged with one W. C. Roberts, a real estate and loan broker of Greeley, to negotiate the two new notes. Achziger made his note for \$6500 to the order of Roberts, secured by a deed of trust on the land he was buying. At the same time, McClellan made his note to Roberts for the \$10,000, and secured it by deed of trust on the land which he retained. The notes and trust deeds, together with a deed from McClellan to Achziger, were executed in the office of W. R. Kelly, attorney at law, of Greeley. Roberts claimed to represent the Colorado Springs holders of the old \$6500 note, and under the agreement he was to pay off this indebtedness with the proceeds of the Achziger note. He was to pay the Sanborn encumbrance out of the proceeds of the McClellan \$10,000 note, turning over to McClellan the surplus proceeds. Some question is made as to the delivery of these papers, but we think their delivery was established. The papers were entrusted to Roberts to negotiate the notes, and apply the proceeds thereof as above stated.

Roberts recorded the deed from McClellan to Achziger, and the deeds of trust; sold the \$6500 note to defendant in error, Eckhardt, and the \$10,000 note to defendant in error, Morris, and appropriated the proceeds to his own use. Shortly thereafter, he committed suicide, being hopelessly insolvent.

It should be noted that the arrangement with Roberts followed the making of a written contract between Achziger and McClellan, in which the discharge of the encumbrances, as above stated, was fully agreed upon. This fact is important as bearing upon the question whether or not there was a breach of McClellan's covenant against encumbrances in his deed to Achziger.

Achziger in his action attacked the validity of the notes given to Roberts, alleging that the defendants in error, Eckhardt and Morris, were not holders in due course. He also alleged a breach of McClellan's warranty against encumbrances. McClellan, by answer and cross-complaint, also attacked the transfer to Morris and Eckhardt, alleging, also, that there had been no delivery of the deed to Achziger. The principal issue was as to the good faith of the purchasers of the two notes given to Roberts. Upon that issue the court found in favor of the defendants. Morris, in the meantime, had purchased the \$6500 note from the Colorado Springs parties, and Achziger borrowed \$5000 of Eckhardt on his note secured by a deed of trust on the land conveyed to him by McClellan.

The decree adjudged the deed from McClellan to Achziger, the delivery of which McClellan contested, to be a valid conveyance, and that the covenant against encumbrances had been violated by McClellan; that \$5000 borrowed by Achziger from Eckhardt should be a first lien upon Achziger's land, Achziger's \$6500 note being made a second lien, and his note to McClellan for \$8500 reduced to \$3500, the third lien.

The decree directed that this \$5000 which had been paid into the registry of the court, should be paid to Morris, who should, out of it, pay the Sanborn indebtedness, certain attorneys' fees for services rendered in relation to the said Sanborn notes, and that the balance, if any, be applied on the \$6500 note purchased by Morris from the Colorado Springs Company.

It was further decreed that McClellan should bring into court the \$8500 in notes given by Achziger to him, and

that there be credited thereon the \$5000 borrowed by Achziger and turned over to Morris, and that Morris cause release deeds to be executed freeing the Achziger land and water from the lien of the old \$6500 indebtedness and the Sanborn indebtedness.

As a necessary part of a review of this decree, it must be determined whether or not Achziger and McClellan were equally responsible for the employment of Roberts to negotiate the notes. This involves also that part of the decree which held that there was a breach of McClellan's covenant of warranty against encumbrances.

The complaint alleges that the Achziger note was made to Roberts, and delivered to him by direction of McClellan. The trial court evidently accepted that statement as the basis of a part of the judgment.

The evidence does not sustain that allegation. It appears from the testimony of Mr. Kelly, the attorney, and from the testimony of Achziger himself, that Achziger acted in the matter in his own interest, as did McClellan in his, and that the action on the part of each was in accord with the contract between them, each making Roberts his agent in the transaction.

While, as a general rule, in an action of covenant for breach of warranty against encumbrances, a knowledge of an encumbrance upon the part of the vendee does not constitute a defense, yet, when it appears that the vendee has assumed the removal of such encumbrance the rule does not apply. 15 C. J. 1278; *Reid v. Sycks*, 27 Ohio St. 285; *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558.

The record contains a contract between McClellan and Achziger, under which Achziger purchases the land subject to the two encumbrances, and agrees that he will discharge the \$6500 encumbrance.

The evidence conclusively establishes the fact that the \$6500 note executed by Achziger was intended to enable him to raise money with which to pay off said encumbrance, and that Achziger made Roberts his agent to negotiate the note, and pay the indebtedness.

On the undisputed testimony, it must be held that the execution of the McClellan-Achziger deed and its delivery, were in part performance of the contract in evidence, and as a part of the original transaction.

The judgment as to the validity of the notes in the hands of Eckhardt and Morris must stand unless it appears that the court's findings were not sustained by the evidence. There is no question that if either Morris, or Eckhardt directly, or Eckhardt's agent, Hayden, was aware of the conditions under which the embezzled notes were entrusted to Roberts, the transfers were invalid. The modern doctrine is that if a note is taken by endorsement under circumstances which impute knowledge of infirmities in it, so that the taking of it amounts to bad faith, the transferee is not a holder in due course.

In *Rochester & Charlotte Turnpike Co. v. Paviour*, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790, it is said:

"One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint."

This law has been embodied in our negotiable instruments act.

In section 4515, R. S. 1908, to constitute one a holder of a note in due course it is required:

"That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Other provisions of the act pertinent to the question in this case include section 4518, which provides that:

"The title of a person who negotiates an instrument is defective within the meaning of this act * * * when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Section 4519 which provides that:

"To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

And section 4522 which provides that:

"When it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It cannot be doubted that under section 4518 Robert's title was defective when he negotiated the notes, since he did so in breach of faith. Then, under section 4522 the burden was upon Eckhardt and Morris to show that they acquired the notes in due course. The statute is so construed in *Savings Bank v. Gregg*, 51 Colo. on page 362, 117 Pac. 1003. If they took the notes with knowledge that Roberts held them for negotiation to obtain funds for the payment of the existing encumbrances, they knew of Roberts' agency in that matter, and they are not holders in good faith. This is so not only under the statute, but under the settled rules of law regardless of statutes. This is distinctly held in *Johnson v. Harrison*, 177 Ind. 240, 97 N. E. 930, 39 L. R. A. (N. S.) 1207, a case particularly applicable to the situation of Morris, because there, as here, the agent received a release of his own debt as part consideration for the sale of the paper. The court held that the fact that the party offering the paper for sale was willing to apply a part of the proceeds on his debt was sufficient to put the purchaser on inquiry. To the same effect is *Brueggestradt v. Ludwig*, 184 Ill. 24, 56 N. E. 419.

Knowledge of the fact of agency destroys the apparent title of the holder, and the intending purchaser must then look to the authority of the agent. *Bank v. Ohio Valley Furniture Co.*, 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

One having possession of negotiable paper has *prima*

facie title thereto. That title may be defeated or overcome by evidence that the note is held as an agent. If the agency permits the agent to receive the proceeds without limitations as to their application, one taking the note need not follow the proceeds.

But, "If the agency of the party is made to appear, the principal will not be bound beyond the authority given. And where the holder has notice that the party acting as agent is such, he is bound to inquire into his authority." Randolph on Commercial Paper, sec. 388.

"A principal may confer as much or as little authority as he sees fit upon his agent, and he may also impose such lawful restrictions and limitations upon his agent as may be deemed proper, and such restrictions and limitations will be as binding upon third persons who have notice of them as upon the agent himself, provided the principal does nothing to waive them." *American Lead Pencil Co. v. Wolfe & Co.*, 30 Fla. 360, 11 South. 488.

If limitation of the agent's authority is known to the person with whom he deals, the principal will not be bound if the agent exceed his authority. *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96.

From the evidence of Mr. Kelly, of whom Hayden, acting for Eckhardt, inquired in regard to the \$6500 note, it appears that Hayden had notice that there were certain conditions to be performed before the note was to be delivered; and this was notice to Eckhardt whose agent Hayden was, according to Eckhardt's own testimony. Moreover, Hayden's admissions, reluctantly made, establish the fact that he knew that Roberts held the notes on condition, and that they were taken over for Eckhardt on the assumption that Roberts would comply with said conditions. Under the authorities, when Hayden became aware of the fact that Roberts held the notes on condition it was his duty to make sure that the conditions had been met. Not having made proper inquiry he is affected with knowledge of all facts which the inquiry would have disclosed. He cannot shut his eyes to matters clearly suffi-

cient to put him on inquiry, and then claim to be an innocent purchaser. His knowledge is imputed to Eckhardt, who is not, therefore, a holder in due course. The court's finding to that effect is contrary to the evidence.

Morris, the holder of the \$10,000 note, testified that he did not have knowledge that the note was held under any conditions, and that he would not have bought it had he known of such conditions. Morris paid for the note by surrendering a \$5000 note of Roberts' which he held, and turning over to Roberts liberty bonds to the extent of \$3500. Later, Morris began a suit to prevent the sale of the crops on the McClellan farm, claiming that they should go to him as holder of the \$10,000 note, and the \$6500 note, which he had bought from the Colorado Springs Company.

In this latter suit Morris admitted that when he bought the \$10,000 note he knew that Roberts, out of its proceeds, was to pay off the prior encumbrances. He says he trusted Roberts to pay them off. These statements put him in the same class as Hayden, and as to his knowledge there is no question.

When he bought the paper with knowledge that Roberts held it as an agent of the maker to raise money to pay off another debt, and paid for it by releasing Roberts' debt, the title which Morris received was affected by another principle of the law of agency, namely, that an agent has no power to use his office otherwise than for the benefit of his principal. The fact that Morris gave something additional would not affect the application of this principle. The transaction was an entirety. *Dowden v. Cryder*, 55 N. J. L. 329, 26 Atl. 941.

In Tiedeman on Commercial Paper, section 82, it is said: "It is implied in every agency, in the absence of express evidence to the contrary, that the power of the agent is to be exercised for the benefit of the principal, and not for his own private advantage."

After Morris had given the testimony above mentioned, McClellan filed a petition asking that the judgment be vacated upon the ground that it had been secured by false

testimony on the part of Morris; that evidence of the fact that he knew of these conditions on which the notes were held by Roberts was, under the circumstances, impossible to obtain except from Morris himself.

The trial court denied the relief sought, and dismissed the petition. The court's action in that respect, is here for review.

To permit a judgment thus obtained to stand is to refuse to apply, in a case wherein it is clearly applicable, one of the best established rules of equity, and to put a premium on fraud. It is axiomatic that one shall not profit by his own wrong.

Some objection is made as to the procedure, but under our practice, as several times announced, a petition or a motion filed in the cause is sufficient to bring the matter before the court. *Jotter v. Marvin*, 63 Colo. 222, 165 Pac. 269. Plaintiff in error was entitled to the relief sought, and the court erred in dismissing the petition.

The evidence is all before us, and the questions involved have been fully and ably argued; we have, therefore, deemed it best to determine the cause on its merits.

The decree goes farther than necessary, and makes a new contract for Achziger and McClellan, very different from the original. By the decree Achziger is left exactly as he was to be by the original contract, that is, he has a deed to the land subject to a total indebtedness of \$15,000.

McClellan, on the other hand, holds his land subject to the original debt of \$6500, which was secured by the whole tract, including the part deeded to Achziger, and to the \$10,000 lien of the security held by Morris; the \$8500 note, which was a second lien on the Achziger land, is reduced to \$3500, and made a third lien; he is required to pay \$411 fees to the attorneys of the Sanborn estate, and the costs of the entire suit. He is relieved of the Sanborn indebtedness, and, possibly, of a small part of the original \$6500 debt, as Morris is directed to apply on it any balance of the \$5000 after paying the Sanborn debt and attorneys' fees.

No reason appears for assessing McClellan with attor-

neys' fees in behalf of the Sanborn estate, which was not a necessary party to the suit on the plaintiff's theory that the two notes were invalid in the hands of Eckhardt and Morris. Nor was there any reason in any event for the allowance of any considerable sum as fees, since the appearance in behalf of the estate was merely nominal. Its lien was not involved, and could not be disturbed, or changed without the consent of the estate's representatives.

It conclusively appearing that because of the default of their agent, neither Achziger nor McClellan could carry out their agreement, it should be held that they were both equally in default as to it, and, as the court had no right to make a new contract for them, they should be restored to the *status quo*. That is, the deed from McClellan to Achziger, the Achziger-Roberts note of \$6500, and the McClellan-Roberts note of \$10,000 should all be canceled, saving to the holders of the two notes their rights, if any, against the Roberts estate on his endorsement. McClellan's entire tract should be held to be security for the \$6500 note now owned by Morris, and for so much of the \$5000 loaned by Eckhardt to Achziger as was used to pay the Sanborn estate note; also, for any amount credited on the \$6500, as directed by the decree; for the total amount of which payment and credit McClellan should execute a note to Eckhardt, at the rate of interest borne by the Sanborn note, and for such time as the trial court deems reasonable, to be secured on McClellan's entire tract; subject only to the said \$6500 indebtedness; provided always that McClellan elect to be restored to the *status quo* on the conditions above stated. The trial court by said decree should determine what, on the facts, is the liability of Achziger to Eckhardt, if any, on the \$5000 note, it not appearing whether said note was executed voluntarily by Achziger, or as a part of the plan developed by the decree. A reasonable fee should be allowed the attorney of the Sanborn estate. The costs in this court should be assessed against Eckhardt and Morris, except only the cost of the bill of exceptions filed as an exhibit herein; each party paying his costs in

the court below, except only the Sanborn estate, whose costs shall be assessed to Achziger, Eckhardt and Morris, equally.

The judgment is reversed and the cause remanded with directions to enter judgment as above presented.

MR. CHIEF JUSTICE SCOTT not participating.

On Petition for Rehearing.

It appears from the statement of counsel in petition for rehearing, that the \$5,000 which was deposited by Eckhardt as a loan to Achziger, and which the court, by its decree distributed, has not yet been so distributed and applied. If the money is still in the registry of the court, Eckhardt will be permitted to withdraw the same on the surrender to Achziger of his note and releasing the deed of trust.

This \$5,000 not having been devoted to the payment of the Sanborn estate mortgage and there being a cross-complaint in this action seeking to foreclose said mortgage, the matter of counsel fees for a foreclosure will not be determined as a part of this judgment. The parties involved in that matter will be left to proceed according to their rights and interests.

It is further claimed that the record shows payments by Roberts to McClellan of something over \$1,700. It does not appear, however, that this money was paid upon the \$10,000 note. At all events, Morris bought the note without any credits thereon. Whether the said payments should belong to Morris or to the Roberts estate is a matter not to be determined in this action.

The petition for rehearing is denied.

No. 10,253.

PITTS v. NATIONAL INDEPENDENT FISHERIES Co.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Action in debt. Judgment for plaintiff.

*Affirmed.**On Application for Supersedeas.*

1. ACCORD AND SATISFACTION—"In full to Date." It is not every use of the words "in full to date" or equivalent phrase which constitute an accord and satisfaction in connection with the payment of a controverted claim.
2. *Elements.* To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such conditions.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. HOWARD L. HONAN, Mr. W. FELDER COOK, for plaintiff in error.

Messrs. ELLIS, ROBINSON & SARCHET, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action by a seller against the buyer to recover for goods sold and delivered. The answer pleads payment, and also sets up a plea of accord and satisfaction. A trial to the court resulted in findings for plaintiff, and a judgment in its favor for \$978.43. The defendant has sued out this writ of error, and the cause is before us on his application for a supersedeas.

The plaintiff in error, defendant below, contends that the court erred in not finding that there had been an accord and satisfaction.

The plaintiff below sold and delivered to defendant various quantities of fish, at different times between February 20, 1920 and May 1, 1920. There was some dispute between the parties, at about the date last mentioned, as to what deductions, credits, or allowances should be given to defendant. On May 8, 1920, the defendant mailed to plaintiff a check for \$692.35. When the check was introduced in evidence it bore the notation, "In full to Date." The plaintiff, in its evidence, denied that the notation appeared on the check at the time it was received. The trial court held that whether the notation appeared thereon at such time or not, the defendant did not establish his defense of accord and satisfaction. The defendant now contends that the court could not dispense with a finding as to the existence of the notation, because, as he claims, the notation, "In full to Date," of itself proves an accord.

In *Worcester Color Co. v. Wood's Sons Co.*, 209 Mass. 105, 95 N. E. 392, the court said:

"It is not every use of the words 'in full to date' or equivalent phrase which constitutes an accord and satisfaction in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made."

In the instant case the check accompanied a letter to plaintiff. The amount of the check corresponded exactly to the last four bills for goods which defendant had received, less \$12.90, which sum defendant claimed, in the same letter, ought to be deducted from the total amount of the four invoices. The language of the letter indicates that the check was sent and offered in payment for the four specific items, and not in settlement of all past transactions, involving defendant's counterclaims. It seems that plaintiff's agents or officers could not construe the letter

otherwise, even if they did observe the alleged notation on the check.

In order to constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such conditions. 1 C. J. 557; *Rio Grande County v. Hobkirk*, 13 Colo. App. 180, 56 Pac. 993.

Under the circumstances in this case, the question of accord and satisfaction was one of fact, and the evidence is sufficient to support the finding in that respect. In view of the contents of the letter accompanying the check, and other circumstances, the court could assume, as it evidently did, that the alleged notation was upon the check, and still find, as it did, that accord and satisfaction was not established by the evidence. *Worcester Color Co. v. Wood's Sons Co.*, *supra*.

There is no error in the record. The application for a supersedeas is denied, and the judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,274.

EYKELBOOM v. THE PEOPLE.

Decided April 3, 1922. Rehearing denied May 1, 1922.

Proceedings involving contempt of court. Plaintiff in error adjudged guilty of contempt.

Affirmed.

On Application for Supersedeas.

1. **WRITS—Search and Seizure—Subpoena Duces Tecum.** Section 7, article II of the Constitution, providing security against unreasonable search and seizure, has no application to ordinary cases of the production of documents under a *subpoena duces tecum*.
2. **COURTS—Powers—Subpoenas.** Courts have inherent power to issue subpoenas, and that power is not limited to the parties, nor is it affected by section 7, article II of the Constitution concerning search and seizure.
3. **CONTEMPT—Refusal to Produce Documents.** A witness who refuses to produce documents in court as ordered, without justification, is guilty of criminal contempt.
4. **Perjury.** A court has a right to punish as a contempt, manifest perjury committed in its presence, where the court knows judicially and beyond doubt that the testimony is false.
5. **Purging of Contempt.** One who has given false testimony in a court, or conducted himself in an insolent and contemptuous manner in its presence, cannot purge that contempt by a written denial under oath that it ever occurred.
6. **Order of commitment—Recital of Facts.** Cases of criminal contempt are not within the provisions of section 356, code 1908, providing that the order of commitment shall recite the facts. In no event would more than a substantial compliance be required.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. J. W. KELLEY, for plaintiff in error.

Messrs. GILLETTE & CLARK, for the people.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error was sentenced to the county jail for contempt of court for failure to produce papers as required by a *subpoena duces tecum*. To review that order he

brings error and asks the issuance of a supersedeas.

The Denver State Bank was engaged in a general banking business in the city of Denver and The Guaranty Securities Company in negotiating loans and dealing in bonds and securities. The two concerns occupied the same quarters. One Matthews was president of both and plaintiff in error Eykelboom was secretary and manager of the Securities Company and vice-president in charge of the bank. July 19, 1921, the State Bank Commissioner of Colorado, duly authorized by law, revoked the authority of the bank, took possession thereof, and brought an action against the Securities Company alleging that the business of the two concerns had been "intermingled, jumbled and confused" for the benefit of the Securities Company and to the detriment of the bank; that said Matthews was president of a similar company in Nebraska and that these men, by the use of these companies and this bank, operated "an elaborate system of kiting of checks" to the detriment and loss of the bank; that the company had many creditors including the bank; that it was unable to pay and threatened with numerous suits. The complaint set out in detail three separate causes of action for \$2908.06, \$2250.00 and \$9000.00 respectively, together with interest, prayed the appointment of a receiver and that all the property and assets of the company be delivered to him, and the company's officers and agents be enjoined from interfering therewith. This complaint was filed September 15, 1921. Summons was served upon Eykelboom the day before. September 21, 1921, *subpoena duces tecum* was issued directed to Willis Christian and L. D. Eykelboom commanding them to appear on September 22, at 10:00 a. m. in Division 2 of the Denver District Court "to be examined as a witness" and to "produce at the time and place aforesaid a certain package of letters, originals and carbon copies, passing between Williard V. Matthews and L. D. Eykelboom and between 'Williard' and 'Bob' identified by the initials 'F. E. H. 1 to F. E. H. 92' and 'I. M. G.' now in your custody and control * * * and for failure to attend, you

will be deemed guilty of a contempt of court" etc. This subpoena was served the same day. September 22, 1921, Samuel J. Sackett was appointed receiver and qualified.

September 10, (Saturday) 1921, Eykelboom was in New Mexico and had left his Denver office in charge of said Willis Christian. On that day Christian was served with a writ of replevin issued out of J. P. court under which a constable took the file of letters in question, and on the same day Christian obtained the file under a re-delivery bond and returned the documents to a drawer of Eykelboom's desk where they were usually kept, and closed and locked the desk. Prior to their return they had been initialed as described in the subpoena. Eykelboom returned to Denver Sunday evening, talked with Christian at the banking room Monday September 12, and on the day following the latter left for his former home in Wolcott, New York, where he has since remained.

When Eykelboom appeared in court September 22, in response to the subpoena, he was sworn and examined. He stated, among other things, that he did not have the letters; that upon his return from New Mexico they had disappeared; that he did not know where they were; that he had no conversation with Christian about them; that he did have such a conversation; that he had consulted with his attorney Kelley about appearing in answer to the subpoena; and that he did not consult Kelley about appearing in answer to the subpoena. During this examination Kelley was not present. A recess was taken until 2:00 p. m. of the same day at which time the witness was ordered to return with the missing documents. He did return, accompanied by his attorney Kelley, and was again interrogated about the letters. He said, among other things, that they pertained to private correspondence between himself and Matthews; that they were about the affairs of the company; and that they contained instructions from Matthews to the witness about the business of the company. The matter was again continued for ten days for Eykelboom to produce the letters and he was placed under a *ne*

exeat bond of \$1000.00. October 3; the hearing was resumed. Eykelboom testified that he had wired Christian as follows:

"Receiver has been appointed for Guaranty Securities Company. I am accused of having the file of letters which you had in your possession when replevin suit was begun in Justice Court. I have been given ten days to produce the letters. If you have letters send them to Samuel J. Sackett attorney Foster Bldg. Denver who has been appointed receiver for company. If they are not in your possession wire Sackett where they are. If you mail them register package. Don't fail to act promptly. I will defray all expenses."

To which Christian answered, "I haven't the letters"; that while he was in New Mexico Christian was his clerk; that Christian had never been his clerk; that upon his return Christian told him he had the letters in his possession; that Christian did not tell him where the letters were; that Christian had no other papers of the company in his possession because none were missing; that a whole bunch of papers were missing; that he employed Kelley to protect Christian; that he did not employ Kelley to protect Christian; that he did not know if the papers were in existence or were destroyed; that he advised Christian to stay in New York until this suit was determined; that he told Christian not to go away on account of this suit; that he did not know the papers had been examined and initialed; and that Christian told him this had been done. The hearing was thereupon continued to October 13, and again to October 24, and again to November 7. On the latter date McMillan, deputy State Bank Commissioner, testified he had gone to Omaha, had been refused inspection of the records in possession of the trustee in bankruptcy for the Nebraska Company, had obtained an order from the Federal Judge permitting such inspection, had examined all said records and files and found them intact save only the duplicate of the file missing from the Denver office, which duplicate could not be found. Eykelboom was

again examined and testified that he had gone to Omaha (prior to the visit of McMillan there); that he talked with Matthews and told him every detail of the proceeding; that he did not discuss the detail of the file with Matthews; that Matthews was president of the bank in Omaha that failed and president of the Nebraska Securities Company; that no one had a key to the Denver desk save Christian, Matthews and himself; that he went to Omaha on Kelley's advice to get copies of the papers; that he did not go to get the papers but "to arrange for them to get copies if they wanted to"; that Mr. Webb (formerly personal attorney for Matthews, thereafter trustee in bankruptcy of the Nebraska Company, and who furnished the security on Eykelboom's *ne exeat* bond) told him, "If your opponent in Denver wants these copies they can get them at any time through the court—why don't they get them? I don't want to give them to you"; that while in Omaha for two days he stayed at Matthews' house.

The transcript shows that the court found as follows:

September 22, that Eykelboom had conspired with Christian, and perhaps others, to put the letters out of reach of the court, had given testimony full of contradictions and mis-statements and showing a plain attempt to disguise the facts.

October 3, that it was clear Eykelboom had destroyed the letters, or conspired for their destruction, or was secreting them from the court; that he knew whether they existed and if they existed could produce them; that as shown by his "appearance," his "hesitancy," his "evasiveness" and his "effort to bluff" he alone was responsible for making away with the letters, and he was adjudged in contempt.

November 7, that Eykelboom had willfully placed himself in contempt of court; that he refrained from producing the files knowing what became of the one in his possession.

Thereupon the order of commitment complained of was entered. It recites that "at this day L. D. Eykelboom hav-

ing been found guilty of contempt of court, it is ordered," etc. The facts constituting the contempt are not recited in this order. Thus far the power of the court to issue the subpoena, enforce the same, and examine the witness concerning the documents, had not been questioned.

Defendant's bill of exceptions was prepared and tendered to the trial judge on December 7, and on December 27 Eykelboom sought to purge the contempt by a tender of affidavits of himself and Christian. Eykelboom's affidavit is a mere compilation of the most favorable version of the transaction possible from his testimony, omitting the contradictions and inconsistencies. The only new matter contained therein is the assertion that he had no intention to be defiant or contemptuous. Christian's affidavit is a simple assertion of the truth of Eykelboom's affidavit, as far as the facts are known to him, with the added statement that he never told Eykelboom, or any one else, that he had returned the papers to the roll top desk. Both these affidavits were ruled out by the court.

BURKE, J. After stating the facts as above.

Plaintiff in error contends, 1. That the subpoena issued in violation of section 7, article II of the Colorado Constitution. 2. That Eykelboom is excused by having shown his inability to comply with the order. 3. That the court could and did do nothing more than reach the conclusion that Eykelboom had testified falsely and had no power to punish for contempt upon that basis. 4. That the affidavits of Eykelboom and Christian, tendered December 27, purged the contempt. 5. That the judgment order is invalid because it fails to set out the facts constituting the contempt as required by section 356 of the Civil Code. (R. S. 1908.)

1. Section 7 article II of the Colorado Constitution provides security "from unreasonable searches and seizures," that search warrants shall not be issued without probable cause supported by oath reduced to writing and describing the place to be searched or the thing to be seized. It has

no application to ordinary cases of the production of documents under a *subpoena duces tecum*. It is admitted that some of these letters contained instructions concerning the business of a concern in charge of the court by receivership. To what extent they belonged to the company was, and is, disputed but so far as they did the court had power to compel their production. The witness, an officer of that company and as such in possession of these papers, failed and refused to deliver them. He made no offer to segregate that portion which he claimed was private and deliver the remainder. His claim to exemption under this section of the constitution is raised for the first time in this court and is without merit. Having attended in response to the subpoena and submitted to examination without objection he waived any irregularity. *Scott v. Shields*, 8 Cal. App. 12, 96 Pac. 385, 387.

The court had inherent power to issue the subpoena. That power was not limited to the parties or affected by said section 7 article II of the constitution. *United States v. Terminal R. R. Assn.*, 148 Fed. 486.

2. We are unable to agree that this record discloses Eykelboom's inability to produce the papers. If it does not clearly show the contrary we think it does clearly show that Eykelboom testified falsely as to the reason for that inability. He refused in court to produce the documents as ordered. If without justification that conduct constituted criminal contempt. The justification he offered was inability due to no fault of his own. The falsity of that justification appears from his own testimony. That manifest falsehood, in the immediate presence of the court, constituted a direct contempt.

3. It is the law that a court has the right to punish as a contempt manifest perjury committed in its presence, where the court knows, judicially and beyond doubt, that the testimony is false. 13 C. J. 25.

We think that the language of the record before us so shows. Add to this the emphasis of that conduct and demeanor found by the court and the conclusion must have been irresistible.

4. The affidavits of Eykelboom and Christian presented on December 27, do not purge the contempt. They merely deny it. Taken in connection with what had gone before they emphasize it. One who has given false testimony in a court, or conducted himself in an insolent and contemptuous manner in its presence, can not purge that contempt by a written denial under oath that it ever occurred.

5. Section 356 Civil Code (R. S. 1908), requires the order of commitment to recite the facts only where summary punishment is inflicted. It is so interpreted in *Shore v. The People*, 26 Colo. 516, 520, 59 Pac. 49. Cases of criminal contempt (such as the one before us) are not within the provisions of said section. In no event would more than a substantial compliance be required. *Wyatt v. The People*, 17 Colo. 252, 267, 28 Pac. 961. The record before us clearly sets forth the facts. They were pointed out by the trial court at the time of their occurrence and Eykelboom's attention directed to them and to the court's conclusion that they constituted contempt.

The supersedeas is denied and the judgment affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,219.

MENZEL, ET AL. v. THE MCKEE LIVESTOCK COMMISSION CO.

Decided April 15, 1922. Rehearing denied May 1, 1922.

Judgment Affirmed.

1. APPEAL AND ERROR—*Court Equally Divided, Judgment Affirmed.*
The court being equally divided, the judgment is affirmed.

Error to the District Court of Custer County, Hon. James L. Cooper, Judge.

Mr. J. D. BLUNT, Mr. DELBERT A. HESSICK, Mr. JAMES T. LOCKE, for plaintiffs in error.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE, for defendant in error.

En banc.

PER CURIAM.

IN this cause, the court being equally divided, the judgment of the trial court stands affirmed by operation of section 438 of the Code, Revised Statutes, 1908.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,013.

WHITEHEAD v. DESSERICH.

Decided March 6, 1922. Rehearing denied May 1, 1922.

Action to quiet title. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—Objections not Raised Below.** Where defendant amended his answer accepting the issue tendered by an amended reply, which issue was tried without objection upon his part, assignment of error based on the ruling of the trial court permitting the filing of the amended reply, not sustained.
2. **TAXES AND TAXATION—Lien—Sale.** A tax sale cuts off the lien of any earlier levied tax.

3. **COLOR OF TITLE**—*Tax Deed*. A deed purporting to convey title may be defective, convey no title, and yet give color of title.
4. **REAL PROPERTY**—*Title—Possession and Payment of Taxes*. Exclusive possession of land under color of title and payment of taxes for seven consecutive years constitutes a good title.

Error to the District Court of Jefferson County, Hon. Samuel W. Johnson, Judge.

Mr. W. H. WHITEHEAD, *Pro se*.

Mr. A. C. PATTEE, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error had judgment in a suit to quiet title in which the plaintiff in error was the only defendant who appeared and answered. The parties will be designated as in the trial court.

The complaint alleged plaintiff's ownership and possession, and that the defendants asserted some interest or claim in the land in question, and prayed that the defendants might be required to set forth the nature of their claims, etc.

Defendant Whitehead answered denying the plaintiff's title and possession, and alleging that defendant had a lien upon the property by virtue of tax certificates on sales for taxes for the years 1895, 1896 and 1897; and alleged further that he had paid the taxes for the year 1898. The defendant prayed that if the plaintiff be found entitled to the property as against the defendants other than Whitehead, he should be required to redeem from the several sales and the payment made by said defendant.

Plaintiff replied admitting the ownership of the tax certificates and the payment of the tax for 1898, but denied that defendant had any right to require the plaintiff to redeem from said sales, and denied that the certificates were liens upon the real estate.

This reply was filed on May 11, 1918. Thereafter, a mo-

tion to strike a part of the reply was filed, and said part was withdrawn by stipulation of the parties. On November 9, 1918, plaintiff asked leave to amend his reply, which leave was granted. He thereupon amended his reply by alleging that he had been for more than seven years, prior to the commencement of the suit, in the actual possession of the said lands, under claim and color of title, made in good faith, and that for more than the said seven years, while in such actual possession, he had in good faith paid all the taxes assessed against said land, and that his possession was open, adverse, peaceable and exclusive during said period.

Motion to strike that part of the reply which sets up the statute of limitation and possession thereunder was denied.

On December 28, 1918, defendant filed an amendment to his answer in which he alleged that the claim of ownership and possession by the plaintiff was based upon four tax deeds, issued to the plaintiff for unpaid taxes for the year 1899, and that said taxes were not legally levied. The answer points out various alleged defects in the conduct of the sale for taxes.

A demurrer to the amended answer was overruled. On trial to the court, the court found that the plaintiff had sustained his allegations of possession and payment of taxes under color of title, made in good faith for more than seven years, and entered judgment in his favor.

The first error argued is in the ruling of the court upon the application to file an amendment to the reply. Counsel urge that it was not filed in apt time. We think the objection not well taken in view of the action of the defendant in amending his answer after the amended reply was filed, in which answer he accepts the issue tendered by the reply, and attacks the tax deed under which the plaintiff claimed color of title. The issue thus made was tried without objection by defendant.

The next assignment of error is that the court erred in not recognizing defendant's certificates of sale as giving him a perpetual lien which could not be destroyed by a sub-

sequent sale. This ignores the rule that a tax sale cuts off the lien of any earlier levied tax. *Bennett v. City & County of Denver*, 70 Colo. 77, 197 Pac. 768. Were the defendant's theory to be accepted, the state would, in many cases, be unable to collect its taxes by a tax sale, since the buyer must pay all back taxes, or redeem from all tax sales.

It is further urged that the court erred in holding plaintiff's tax deed to section 21 sufficient to give color of title. Counsel offered evidence from the records of the county which he claimed showed that the tax deed was irregularly issued. That evidence, however, was wholly immaterial. The only question to be determined is, did the tax deed give color of title. Counsel for plaintiff in error has confused the question as to what is sufficient in a tax deed as evidence of title, and the very different question of what kind of a deed gives color of title. That a deed may be defective, and convey no title at all and yet give color of title is established beyond question. See *Schlageter v. Gude*, 30 Colo. 310, 70 Pac. 428; *Parker v. Betts*, 47 Colo. 428, 107 Pac. 816, and cases cited. This deed complied with the rule in that it purported to convey title, and the defects upon which counsel now insist do not appear on the face of the deed.

The trial court did not err in admitting it and holding it sufficient to give color of title. The evidence that plaintiff had been in the exclusive possession of the property for more than seven consecutive years, during which time he had paid all the taxes assessed against the property, and that he held under the deed in good faith, is uncontroverted.

The judgment is accordingly affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,339.

IN RE INTERROGATORIES PROPOSED BY THE GOVERNOR CONCERNING THE MOFFAT TUNNEL BILL.

Decided April 15, 1922.

1. CONSTITUTIONAL LAW—*Executive Questions*. Under the provisions of section 3, article VI of the Constitution, questions of the executive concerning the constitutionality of proposed legislation are only to be answered when doubt as to the constitutionality is expressed.
2. EXECUTIVE QUESTIONS—*Premature*. Questions propounded by the governor as to the constitutionality of a proposed legislative bill not introduced and which may never be passed, are premature.

En banc.

PER CURIAM.

THE opinion of the court is in response to a communication and several interrogatories from the governor concerning the constitutionality of a measure proposed to be introduced at a special session of the legislature called to meet four days hence.

This court's reluctance to pass upon constitutional questions in response to interrogatories submitted under section 3 of article VI of the Constitution has been repeatedly announced, and the court is unanimously of the opinion that the said provision does not cover the case here presented.

We are requested to give an opinion on the constitutionality of a proposed bill which no one can say will, in fact, be introduced in its present form, and which, if introduced, may be much modified before it requires executive action, and which may never pass at all either in its present or any form.

Moreover, the governor does not say that he doubts the constitutionality of the measure, and it has been decided

that such questions are only to be answered by the court when such doubt is expressed. *In Re Certificates*, 18 Colo. 566, 33 Pac. 556.

The submission of these questions is premature. *In Re Proposed Amendments to the Constitution*, 50 Colo. 84, 114 Pac. 298.

To answer these interrogatories would establish a precedent which would require us to pass upon the constitutionality of all important legislation before presented to the lawmaking body, impose upon the court a burden it would be impossible to carry, and give it an influence upon prospective legislative action not contemplated by the constitution. The right provided by the sections remains, to be exercised at the appropriate time, to either the governor or the legislature.

It is therefore respectfully requested that the interrogatories be withdrawn.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD not participating.

No. 9875.

WEBBER, ET AL. v. PHISTER, ET AL.

Decided May 1, 1922.

On motion to retax costs.

Motion Denied.

1. **EXECUTION—Sale—Validity.** An execution, and sale thereunder, are valid to the extent of the amount properly awarded by the judgment.
2. **COSTS—Retaxation.** When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of

costs against him after he has paid them, or received payment thereof.

Mr. JOHN A. RUSH, Mr. FOSTER CLINE, for plaintiffs in error.

Mr. F. T. JOHNSON, Mr. S. H. JOHNSON, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

MARCH 7, 1921, this court reversed the judgment of the lower court and rendered the usual judgment for costs, which were taxed by the clerk at \$494.20 including the costs of the bill of exceptions, which were \$232.20. August 5, 1921, execution was issued upon said judgment and levied on certain ditch stock, which was sold by the sheriff and purchased by the plaintiff in error, Blanche Webber, for \$100.00, September 28, 1921. The balance of said costs has been paid by defendants in error.

December 5, 1921, in the case of *Antero Company v. Lowe*, 70 Colo. 467, 203 Pac. 265, and other cases we held that costs for bill of exceptions could not be recovered. Defendants in error now move to retax the said costs, to strike out said \$232.20, to vacate the sale and to require Blanche Webber to return the stock and pay \$132.20, the difference between the costs of the bill of exceptions and her bid for the stock.

We cannot grant the motion. The proper taxation would have been \$494.20 less \$232.20, that is, \$262. The execution was valid to that amount. 23 C. J. 407. The sale was therefore valid; so we cannot set it aside. The balance, including the unlawful item of \$232.20 was paid without objection. When there is no fraud or wrongful purpose or mistake of fact one may not object further to a taxation of costs against him after he has paid them (*Thompson v. Doty*, 72 Ind. 336. *Day v. Beach*, 1 How. Pr. 236), or received payment thereof. (*Schermerhorn v. Van Voast*, 5 How. Pr. 458.) Here the clerk and all the parties knew

all the facts but made a mistake of law, and the costs were paid under that mistake; the motion must therefore be denied.

We regret this conclusion the less because the taxation of the cost of the bill of exceptions is reasonable and just, and since the decision in the Antero case we have provided for it by rule. See Rule 50 as amended.

Motion denied.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,081.

WESTERN LIVE STOCK LOAN COMPANY v. CREAGHE.

Decided May 1, 1922.

Action on promissory note. Judgment for defendant.

Reversed.

1. **FRAUD—False Representations—Intent.** In an action for rescission on the ground of false representations, if the alleged representations were false and sufficient to justify a rescission, the intent with which they were made is immaterial and not involved in the action.
2. **Scienter—Evidence.** The unnecessary allegation of fraud does not make a scienter an element of the case. Not being a matter to be proved, evidence on it should not be admitted.
3. **EVIDENCE—Similar Transactions.** While in a proper case, evidence of similar transactions may be introduced to show intent, it should be admitted only in cases where it is clearly competent and relevant to the issue necessary to be determined.
4. **TRIAL—Erroneous Theory—Objections.** If a case is tried upon a theory to which counsel has made proper objection, the fact that he requested instructions which he deemed necessary for

the protection of the interests of his client, does not preclude him from urging that the court erred in overruling his objections to the admission of evidence, or other action in accordance with the theory to which he objects.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. D. W. STRICKLAND, Mr. N. WALTER DIXON, for plaintiff in error.

Messrs. HILLYER & KINKAID, Messrs. NORTHUTT, FREEMAN & NORTHUTT, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error brought suit against the defendant in error on a promissory note given in part payment of a subscription to the plaintiff's capital stock. The defendant, by answer and cross-complaint, alleged that the note was given without consideration; that it and the stock subscription were obtained from defendant by false and fraudulent representations made by the agents of the plaintiff. Defendant therefore prayed that the note and stock subscription be cancelled, and that he recover \$3750, which he had paid in cash on the stock subscription. The defendant had judgment according to the prayer of his cross-complaint, and the cause is now here on error.

The cross-complaint set up seven specific representations alleged to have been made and to have been false. The trial court held that but two of them were actionable representations, to-wit:

"(b) That it was represented to the defendant by the plaintiff company, through its duly authorized officers and agents, that said company had made arrangements to borrow forty or fifty millions of dollars at a rate of interest of between 5 and 6 per cent, which said forty or fifty millions of dollars would be loaned at a rate of 8 per cent; that the fact is that said plaintiff company had not made

arrangements to borrow forty or fifty millions of dollars at a rate of 5 or 6 per cent.

(c) That it was represented to the defendant by the plaintiff company that the company had sold at that time over one million dollars' worth of its capital stock whereas the fact is it had not sold one million dollars' worth of its capital stock."

On the trial defendant was permitted to introduce testimony of other parties to the effect that the plaintiff's agents had made to them representations similar to those to which the defendant testified had been made to him, including those held not to be actionable. The testimony was admitted on the theory that it was competent to prove a *scienter*; that is, fraudulent intent.

Counsel for plaintiff objected to this testimony upon the ground that if the representations proved to have been made were in fact false, and induced the subscription, it was wholly immaterial whether or not there was a fraudulent intent when they were made; that the falsity of the representations alone would make out the defendant's case.

The trial court, however, held that the authorities cited were solely to the effect that in a suit for rescission it is not necessary to show fraud, but that no authority had been produced, and in the opinion of the court none could be produced, which held that, where one had been in fact defrauded, he might not, in such a suit, give evidence of the fraud.

It appears, then, that it was the opinion of the court, and it is urged by counsel for defendant in error, that because fraud had been pleaded it could be proved as a part of the case for rescission.

We do not agree with this contention. During the trial plaintiff's counsel admitted that the falsity of the representations was sufficient to justify a rescission, and that the question of intent was not involved in the action. Such is the settled law in this jurisdiction. *Huston v. Plato*, 3 Colo. 402; *State Insurance Co. v. Dubois*, 7 Colo. App. 214, 44 Pac. 756; *American B. & T. Co. v. Burke*, 36 Colo. 49,

85 Pac. 692; *Lathrop v. Maddux*, 58 Colo. 258, 144 Pac. 870.

It being thus established that the cause of action stated in defendant's counterclaim did not involve intent, and the pleading of fraud adding nothing to the cause of action, it remains to be determined whether a pleader, by setting up matter not relevant to the main issue, will have the right to introduce evidence on such immaterial matter.

Counsel urge that they have the right to plead fraud, and therefore the right to prove fraud. This is contrary to the established rule that the statement of a cause of action should include only the ultimate facts constituting the basis of the action, which should be concisely stated. No authorities are cited in support of the position above stated, but there are eminent authorities to the contrary.

In *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172, it is held that in an action for breach of warranty, where the declaration contained all the allegations "essential to support an action for deceit, apart from the issue as to express warranty," the cause of action on the warranty was not removed from the case, because joined with the action for deceit, and that it was unnecessary to prove a *scienter*. That is to say, an unnecessary allegation of fraud does not make a *scienter* an element of the case. Not being a matter to be proved, evidence on it should not be admitted.

In 1 Chitty on Pleading, (16th Am. Ed.) *154, it is said:

"In an action upon the case in tort for a breach of a warranty of goods the *scienter* need not be laid in the declaration, nor if charged need it be proved."

Unless, then, a *scienter* was properly in the case to be proved there was no basis for permitting evidence of fraudulent intent by proof of similar representations made to others. While the rule is that similar transactions may be proved to show intent, where that is an element of the case, it is recognized by the authorities, and it has frequently been stated, that in the admission of such evidence there is danger that the jury will be misled. It should,

therefore, be admitted only in cases where it is clearly competent and relevant to the issue necessary to be determined. The admission here, if otherwise proper, was without sufficient reason because the plaintiff's attorney had conceded that proof of the statements and that they were false, was sufficient, regardless of the intent; and defendant's attorney had conceded that fraud need not be proved in this case. Just prior to the beginning of the evidence, he said:

"I think the whole question is really one of whether or not the stock subscription contract was procured by means of misrepresentation."

And in discussing the instructions he said:

"It does not seem to be a case in which there would be a question of construing the misrepresentations, or the making of them, as either honest or dishonest. There is no question in this case as to whether the transaction was fair or unfair."

Defendant in error cites several cases, some of which appear to support the court's ruling. No one of them, however, is squarely in point, and in none of them is the reasoning of the court persuasive.

The cases of *Johnson v. Gulick*, 46 Nebr. 817, 65 N. W. 883, 50 Am. St. Rep. 629, and *Clark v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505, are directly in point and against the position of the trial court.

We are of the opinion that upon principle and authority the evidence was not admissible. Defendant in error, however, contends that this objection was waived by plaintiff in error in asking an instruction which involved the law as to fraudulent representations. Plaintiff's counsel had strenuously objected to this evidence of similar representations, but in spite of such objections the evidence was admitted, and the case was to go to the jury upon that evidence. His duty to his client, therefore, was to have the jury properly instructed as to the law applicable to the evidence which they were permitted to consider. If a case is tried upon a theory to which counsel has made proper objection, the fact that he requested instructions which he

deemed necessary to the protection of his client in the case as tried, does not preclude him from urging that the court erred in overruling his objections to the admission of evidence, or other action, in accord with the theory to which he objects.

Plaintiff in error urges that the court erred in admitting evidence upon the statements charged as misrepresentations, but held to be not actionable, and in giving instructions covering these representations. As the case must be reversed because of the errors above indicated, and it being unlikely that upon a new trial like rulings will be made, we do not pass upon such alleged errors.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BURKE not participating.

No. 10,096.

KOBILAN v. DZURIS.

Decided May 1, 1922.

Action for injunction to restrain interference with the use of water and irrigation works. Decree for plaintiff.

Reversed.

1. **WATER RIGHTS—Conveyance.** A deed conveying water rights appurtenant to described land, does not include a reservoir not mentioned, which is not located on the property conveyed, and which was not part of the grantor's irrigation system or rights.
2. **DECREE—Essentials of.** A decree should fix with definiteness the rights and liabilities of the parties, and failing to do so, is erroneous and may be void.

3. **WATER RIGHTS—Injunction—Decree.** In a suit to restrain interference with the use of water and irrigation works, it is error to grant an injunction without definite findings as to the rights of the parties.
4. **APPEAL AND ERROR—Injunction—Insufficient Evidence.** In a suit for injunction, where the evidence is insufficient to support any proper decree, the cause will be dismissed.

Error to the District Court of El Paso County, Hon. Arthur Cornforth, Judge.

Mr. L. W. CUNNINGHAM, Mr. WILLIS L. STRACHAN, for plaintiff in error.

Mr. C. B. HORN, Mr. JAMES A. ORR, Mr. W. D. LOMBARD, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit for an injunction to restrain defendant from interfering with plaintiff's "free use and enjoyment of the waters of Big Sandy Creek," a natural stream, and of springs arising in the bed of that creek, and also to restrain defendant from interfering with a certain reservoir located upon the above named stream. There was a decree for plaintiff, and defendant brings the cause here for review.

The plaintiff and defendant are adjoining landowners. The land belonging to plaintiff is separated from that of defendant by a county road which lies on a section line. The former owns 440 acres in section 21, and the latter 240 acres in section 20, all this being in township 11, range 62, El Paso County. On April 21, 1915, all of the land above mentioned was owned by one J. C. Waugh, who is the grantor of both parties to this controversy. On the date above named Waugh conveyed by deed to plaintiff the land in section 21, and by another deed conveyed his land in section 20 to the defendant. Both deeds contained the usual clauses as to the granting of appurtenances. No water, ditch, or reservoir rights are mentioned in defend-

ant's deed. On the other hand, in the deed to plaintiff, Waugh appears to have conveyed all such rights which he then had, the granting clause containing the following language:

"Also all water and water rights connected with or appertaining to the said land especially including the Waugh Reservoir sites, the Phillips Ditch, the Phillips Ditch No. 2 and the ditch constructed by the grantor herein and A. M. Waugh."

The reservoir involved in this suit and in the injunction prayed for and granted is referred to in the record as Reservoir No. 2. It is not expressly named in plaintiff's deed. It is located, not on the plaintiff's land, but on that of the defendant. It may be assumed, as it apparently was by the trial court, that the plaintiff received, and now owns, all the water, ditch and reservoir rights which J. C. Waugh owned or could convey. However, an examination of the record convinces us that the so-called Reservoir No. 2 is not really an irrigation reservoir, and at the time of Waugh's conveyance to plaintiff this reservoir was no part of his irrigation system, was not appurtenant to the lands conveyed to plaintiff, nor any part of his irrigation property or rights.

The reservoir in question was constructed prior to the year 1885, and during the last thirty-five years was not used for any irrigation purposes. It was at one time convenient for watering stock and was likely constructed for that purpose. No statement of claim was ever filed as to this reservoir. It was never specifically mentioned in any conveyance. It is not essential to plaintiff's use of his ditch or ditches or whatever water rights he has. This fact is made more apparent by the existence of other reservoirs which are mentioned in the record.

The decree gives the plaintiff an easement over defendant's land for the purpose of ingress and egress to and from this reservoir, and adjudges plaintiff to be the owner of the reservoir. The evidence is insufficient to support the decree in these particulars or to warrant the injunctive relief granted.

The decree is erroneous in another respect, namely, the matter of certainty. The trial court finds, in its decree, that plaintiff is the owner of certain lands and;

"Also all water and water rights connected with or appertaining to the said land especially including the Waugh Reservoir sites, and their source of supply from the springs and flood waters in the Big Sandy Creek, the Phillips Ditch, the Phillips Ditch No. 2, and the Ditch constructed by J. C. Waugh and A. W. Waugh."

The court further finds that "the springs arising in the Big Sandy Creek in said section 20," and the storage reservoir (hereinbefore referred to as reservoir No. 2) located in said section 20, and upon defendant's land, "are a part of the water rights connected with" the land of the plaintiff in section 21, "in a sufficient amount to irrigate about forty acres of land located in the northeast quarter of the northeast quarter of said section 21."

The decree then proceeds to enjoin the defendant from interfering with plaintiff's use and enjoyment of the lands and rights above mentioned and "from hindering plaintiff from going on said defendant's land along the course of the Big Sandy Creek for the purpose of maintaining and repairing" the reservoir No. 2, "and from in any way obstructing the free flow of the waters of the Big Sandy Creek and the springs arising therein or the plaintiff's use of said reservoir * * * which will in any way interfere with the plaintiff's use of said waters in a sufficient amount to irrigate about forty acres * * *."

"A decree should ascertain and fix with definiteness and certainty the rights and liabilities of the respective parties to the cause. If it is uncertain and indefinite in these particulars it is at least erroneous, and may be void." 21 C. J. 658.

Looking to the decree, it is uncertain what are the rights of the plaintiff which defendant must respect and not interfere with. It was error to grant the injunction without an adjudication, or certain and definite findings, as to the rights of each party, especially the plaintiff, concerning

the use of water from the Big Sandy Creek, and its springs, for irrigation purposes, and without first determining the amount of water appropriated by the plaintiff or his grantor and the date from which said appropriation became effective. If the defendant must not interfere with plaintiff's water rights, he must also be clearly apprised of what those rights are and to what extent they are superior to his own rights. The effect of the decree is similar to that of a decree under the adjudication statute, as between the parties to the suit, and plaintiff must make the same strict proof here as in a statutory adjudication proceeding. *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395.

The evidence is insufficient to support any proper decree, and so the cause is not remanded for a modification of the decree, but the judgment is reversed and the cause remanded with directions to dismiss the suit without prejudice.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,097.

PHELPS, ET AL. v. PHELPS.

Decided May 1, 1922.

Action to quiet title. Judgment for plaintiff.

Affirmed.

1. *DEED—Delivery.* On the question of the delivery of a deed, the intent of the grantor, where it can be discovered, must prevail.
2. *Acceptance.* The presumption of acceptance of a deed, beneficial to the grantee, obtains only where the facts are known. Where the facts and attendant circumstances are shown, the

question must be determined from them; there is no room for presumption.

3. DESCENT AND DISTRIBUTION—*Rights of Widow to Real Property.*
The rights of a widow to an interest in the real property of her husband under the statute, attach at the instant of the death of the husband.
4. DEED—*Delivery and Acceptance—Rights of Third Parties.*
If between the date of a deed and its acceptance, the rights of third parties attach to the property, those rights will be superior to the title of a subsequently assenting grantee.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. EDWARD M. SABIN, Mr. HENRY E. MAY, for plaintiffs in error.

Mr. F. E. GREGG, Mr. JOHN R. SMITH, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error is the widow of M. M. Phelps, deceased, and the plaintiffs in error are his children by a former marriage. Defendant in error was plaintiff in a suit to quiet her title to a half interest in certain lands, which were claimed by plaintiffs in error under deed from their father. Plaintiff had judgment, and defendants bring the cause here for review.

Of the many errors assigned but one is argued, and that is that the court erred in finding that the deed under which defendants claim was not delivered. The facts material to that question are not in dispute.

It appears that some months before his death M. M. Phelps left with his attorney, Henry E. May, the said deed, which was enclosed in an envelope with the following indorsement, "Please deliver the within deed to the grantees therein named." On one corner of the envelope was the name and address of defendant Watters. Neither of the grantees knew of the deed until after their father's

death. Shortly after his death defendant Phelps received the deed from May on presenting to him a paper reading as follows:

"I will enclose an order for you and Seward to get some papers at Mr. Henry E. May's after my death.

(Signed) M. M. Phelps.

Clary I. Watters and Seward L. Phelps.

Don't let anyone see this

Your Pa This was ——"

It appears also that M. M. Phelps continued in control of said property after the execution of the deed, made leases, collected the rent and paid the taxes. The court found that the evidence showed an intent on the part of the grantor that the deed should not be delivered and become effective until after his death.

It is settled law that the intent of the grantor, where it can be discovered, must prevail. The written evidence of the grantor's intent, taken in connection with his acts after the making of the deed, and the fact that he did not apprise the grantees that he had made the deed, fully support the court's finding.

It is urged, however, that inasmuch as the conveyance was beneficial to the grantees, their acceptance will be presumed, and with such acceptance the title vested in them. But that presumption obtains only where the facts are known. Where the facts and "the attendant circumstances are shown, the question must be determined from them; there is no room for presumption." *Knox v. Clark*, 15 Colo. App. 356, 62 Pac. 334.

In the case cited the question was further discussed, the court pointing out that if "between the date of a deed and its acceptance, rights of third parties attached to the property, those rights will be superior to and prevail over the title of the subsequently assenting grantee."

Further discussing what constitutes an acceptance by the grantee, the court said:

"The difficulty arises where one party undertakes to make a conveyance to another without the latter's knowl-

edge, and without any previous understanding that the act should be done. The filing of the deed by the grantor for record, does not, of itself, constitute a delivery. If the recorder is the agent of the grantee to receive the deed, then, of course, his acceptance would be the act of his principal. But where the latter has no knowledge that such an instrument was contemplated, or that it was made, he can have no agent to receive it; and until, after acquiring knowledge of its existence, he in some way signifies his approval of the act, there is no delivery of the deed."

The rights of the widow attached under the statute at the instant of her husband's death, and the acceptance of the deed thereafter by the grantees named in it was subject to the rights of defendant in error. This question, however, need not be further considered, since the court's finding that the grantor did not intend that title should vest until after his death, is fatal to the claim of defendants, as to the one-half interest claimed by the plaintiff. The judgment is accordingly affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,102.

MILLER v. THE AMERICAN BANK & TRUST COMPANY.

Decided May 1, 1922.

Action to compel payment of bank deposits to assignee thereof. Judgment of dismissal.

Reversed.

1. **PERSONAL PROPERTY—Joint Tenancy.** Joint tenancies with the incident of survivorship, obtain as to personal property.
2. **JOINT TENANCY—Bank Deposits.** A bank account may be so arranged that two persons shall be joint owners thereof during

their mutual lives, and the survivor take the whole on the death of the other. In creating such an account, no particular name or formula is required, and courts in construing the transaction will be controlled by the substance of the arrangement, rather than by the name given it.

3. PLEADING—*Complaint*. Allegations of a complaint in a suit brought to compel the payment of bank deposits, reviewed and held to state a cause of action.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. CHARLES F. MILLER, *Pro se*.

Messrs. FILLIUS, FILLIUS & WINTERS, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

PLAINTIFF, Charles F. Miller, brought this suit to compel payment to him by the defendant bank of a certain deposit in its savings account department. Plaintiff having amended his complaint, defendant demurred thereto, the demurrer was sustained and the cause dismissed on Miller's election to stand by his cause as made. Miller now brings the record here for review on error.

The savings account in question was opened in December, 1916, by Frank Sharp and Nettie B. Losee, by a deposit of \$7,000.00, under the following agreement:

"The German-American Trust Company. No. 47,671.

"In account with Frank Sharp or Nettie B. Losee."

After a statement of account showing the deposit, credit of interest and one withdrawal, is the following:

"We hereby agree to the by-laws, rules and regulations of The German-American Trust Company, governing savings bank accounts, as set forth in the pass book furnished us upon opening our account, and to such other rules and regulations as the bank may prescribe.

"We further agree that all deposits now made or hereafter made for this account are our joint property and

upon the death of either of us shall pass and become the absolute property of the survivor. Any part thereof may be withdrawn upon the order of either of us or the survivor.

“Frank Sharp,

“Nettie B. Losee.”

Sharp died in July, 1917, and in November, 1919, Nettie B. Losee for value assigned and transferred all her interest in the account to plaintiff. The bank declined to pay over the money to him on his demand as such assignee, and he brought this suit with the above stated result.

The complaint as amended shows the deposit with The German-American Trust Company, that The American Bank & Trust Company is its successor, sets forth the agreement quoted above, the fact of Sharp's decease, full compliance with all the rules and regulations of the bank, the assignment to plaintiff, his demand for payment and the bank's refusal. Also that Nettie B. Losee, prior to the time of the deposit, had a joint and undivided interest in the fund, which she held at the time of her assignment to plaintiff.

Plaintiff bases his claim upon the fund upon the last paragraph of the agreement, upon the theory that the death of Sharp vested the entire amount thereof in the survivor. It is settled law that joint tenancies, with the incident of survivorship, obtain as to personal property. As to such tenancies in joint bank deposits, the law is stated in 3 R. C. L., p. 527, as follows:

“It is well established that a bank account may be so fixed that two persons shall be joint owners thereof during their mutual lives, and the survivor take the whole on the death of the other. In creating a joint bank account with right of survivorship, it is a matter of no importance that the particular terms ‘joint ownership’ and ‘joint account’ are not used; the controlling question is whether the person opening the account intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. No particular formula is re-

quired, and courts will be controlled by the substance of the transaction rather than by the name given it."

The bank is a simple depositary, with no apparent independent property interest in the fund, except as created by the deposit. Under these circumstances, as against the bank, the complaint plainly states a cause of action, and the demurrer should have been overruled. Upon the present record we need not discuss or consider the question of gift of any kind, indeed, it would be improper to do so, since it is not involved, there being no such issue.

The judgment of the trial court is reversed and the cause remanded, with directions for further proceedings not inconsistent with the views herein expressed.

No. 10,103.

LEHR v. GUILD.

Decided May 1, 1922.

Action to recover proceeds from the sale of promissory notes. Judgment for plaintiff.

Reversed.

1. **NONSUIT—Final Judgment.** Under rule 5 of this court, an unqualified judgment of nonsuit entered at the conclusion of plaintiff's testimony is as conclusive against him as though judgment for defendant had been entered after full trial.
2. **REMEDIES—Election.** A remedy based on the theory of the affirmation of a contract, is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance or rescission, so that the election of either is an abandonment of the other.
3. **NONSUIT—Res Adjudicata.** An unqualified judgment of nonsuit rendered after full hearing of plaintiff's claim, is a judgment on the merits of the case, and is *res adjudicata* as to all matters involved in the transaction.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. M. W. SPAULDING, for plaintiff in error.

Mr. F. J. KNAUSS, for defendant in error.

En banc.

MR. JUSTICE BAILEY delivered the opinion of the court.

SUIT was by Frank H. Guild, to recover \$900.00 and interest alleged to be due from Earl H. Lehr, as the proceeds from the sale of certain notes owned by Guild and alleged to have been sold by Lehr on the latter's account. The answer denied generally the facts alleged in the complaint. Also it set up a separate defense in bar of the action, alleging that prior to this suit Guild had commenced and prosecuted to final judgment another action against defendant involving the same facts and transaction. Plaintiff demurred to this defense which the court sustained. The cause was then tried upon the issues made by the general denial. Verdict and judgment were for plaintiff in the sum of \$1,040.40. Defendant brings the record here on error for review.

It is admitted that the first suit, the judgment in which is relied upon by Lehr in his second defense in this case as a bar, was between the same parties and arose out of the same facts and transaction. The complaint in the former suit was in tort. It alleged that plaintiff was at all times mentioned the owner of five certain promissory notes for \$500.00 each, made to his order, the payment of which was secured by deed of trust on certain land in Weld County. That prior to May, 1918, such notes and trust deed were pledged as collateral to secure a loan of \$1,000.00. That defendant was and is a real estate agent and broker, in Denver; that plaintiff communicated with him regarding the sale of the notes and trust deed; that defendant, with the intent to defraud plaintiff of his equity in the notes, requested plaintiff to send him an order for their

delivery to him, upon discharge by defendant of the \$1,000.00 loan for the payment of which they were pledged. That plaintiff, relying upon the honesty and good faith of defendant, sent the order accordingly, instructing the bank where the collateral was upon deposit to deliver same to defendant upon payment by him of the loan; and instructed defendant to dispose of the notes and security for a sum which would net plaintiff not less than nine hundred dollars. That pursuant to the terms of said order, defendant secured the notes and trust deed, and fraudulently converted them to his own use, to the injury and damage of plaintiff in the sum of fifteen hundred dollars, and prayed for a body judgment.

The complaint in this suit sets out that plaintiff was the owner of the notes mentioned in the former action; recites the pledge of them as security for the \$1,000.00 loan, and the employment of defendant to sell the notes and trust deed at the price fixed in the first complaint. The complaint alleges the acceptance by defendant of the employment, and his promise and agreement to sell the same at a price to net plaintiff nine hundred dollars. It recites the request of defendant for an order to deliver the notes and security to him, the giving of such order, and the receipt thereof by defendant. It then alleges that defendant sold the notes and trust deed, but failed and refused to pay plaintiff anything from the purchase price thereof, or to make any accounting on the transaction.

In the first suit, after plaintiff had fully presented his case, defendant moved a nonsuit, which was allowed, solely upon the ground of the insufficiency of the evidence to support his action. The question therefore is whether the judgment thus entered was a final conclusion of the controversy so as to bar plaintiff from relief through his present suit on contract. It is manifest that, when the tort action was begun, plaintiff had a choice of remedies, either to proceed in tort or upon contract. He chose the former. When he did so that was an abandonment of any claim of the liability of the defendant on contract.

Under rule 5 of this court, an unqualified judgment of nonsuit entered after plaintiff's testimony was in, is as conclusive against him as though judgment for defendant had been entered by the court after full trial, and upon fact findings by the judge, or upon the verdict of a jury. This is the rule in general, and has the support of practically unanimous authority.

Plaintiff having elected to pursue his remedy in tort, he cannot be permitted, on the same transaction, to try the case upon the theory of contract. There is but one set of facts. There were two remedies, the one in tort, the other in contract. The rule as to election of remedies which is controlling in this case is quoted and approved in *Peppers v. Metzler*, 71 Colo. 234, 205 Pac. 945, from 20 C. J. 14, as follows:

"A remedy based on the theory of the affirmance of a contract or other transaction is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance, or rescission, so that the election of either is an abandonment of the other."

For a fuller citation of authorities see *Lowe v. Howell*, 64 Colo. 100, 170 Pac. 180.

It is plain, from an examination of the pleadings in the first suit, that the agreement there alleged enjoined upon defendant certain duties, out of a breach of which a tort naturally arose. This tort might have been waived, and damages for breach of contract set up in its stead. If there was a mistake of remedy, as argued by plaintiff, in that action, it must appear from the pleadings in that case that plaintiff had no cause of action in tort. As matter of fact this is not true because the things there alleged plainly constitute a tort, if proved, for which recovery could have been had. Moreover, that record discloses that the motion for nonsuit was granted upon the insufficiency of the evidence, and not because, under the alleged facts, no tort action could have been maintained. The judgment of nonsuit, rendered after full hearing of plaintiff's claim, was a judgment on the merits of the case, and is *res adjudicata*

as to all matters involved in the transaction, and a bar to this suit.

The judgment of the trial court is reversed and the cause remanded, with directions to dismiss it.

No. 10,104.

ERNST v. ST. CLAIR.

Decided May 1, 1922.

Action for breach of warranty of title to real property.
Judgment of dismissal.

Affirmed.

1. WORDS AND PHRASES—"Legal Proceedings," "Action". The words "legal proceedings", and "action", as used in section 679, R. S. 1908, mean a suit in court.
2. REAL PROPERTY—*Action for Breach of Warranty—Possession*. Under the provisions of section 679, R. S. 1908, before a grantee in possession can maintain an action against a grantor for breach of warranty, there must be a legal proceeding to obtain possession of the premises, notice to the grantor, and a refusal on his part to defend.

This rule applies where the state holds title to the premises.

3. *Suit on Covenant—Paramount Title*. A surrender to the paramount title will not, in Colorado, support a suit on a covenant of warranty or for quiet enjoyment.

Error to the District Court of Larimer County, Hon. Neil F. Graham, Judge.

Messrs. STOW & STOVER, for plaintiff in error.

Mr. THOMAS Y. BRADSHAW, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

A GENERAL demurrer to the complaint was sustained, the plaintiff stood by the complaint and judgment was entered for defendant. The suit was for breach of the covenants of warranty and for quiet enjoyment in a conveyance to plaintiff's grantor. The complaint alleged that plaintiff had entered into possession of the land in question and the breach alleged was that it belonged to the State of Colorado and that in 1918, the State "did regularly assert" its title and then and there "did duly and regularly institute legal proceedings for the sale and delivery of possession thereof," and that defendant was notified to defend but failed to do so, and so plaintiff was compelled to purchase of the state to protect his title.

R. S. 1908, § 679 is as follows:

"No right of action shall exist upon a covenant of warranty against a warrantor, when possession of the premises warranted hath been actually delivered to or taken by the warrantee, until the party menacing the possession of the grantee, his heirs, personal representatives or assigns, shall have commenced legal proceedings to obtain possession of the premises in question, and the grantor, after notice, shall have refused to defend, at his own cost, the premises in such action."

The defendant claims that the words "legal proceedings" in the statute do not include such proceedings as are mentioned in the complaint, but mean "suits in court," and argues that the word "action," evidently used as a synonym for "legal proceedings," is applicable only to a suit in court.

This argument seems to us well founded. How can it be said that defendant could come in and "defend * * * the premises" in a proceeding by the land board to sell, or that such a proceeding is "to obtain possession of the premises," or that it is an action? The statute clearly means a suit in court for the possession of the land.

The plaintiff in error claims that a paramount title in

the state amounts to eviction, and cases so hold. They also hold that the mere fact of title in the state is a sufficient menace or assertion of title to justify the grantee in surrendering possession or purchasing the paramount title. 15 C. J. pp. 1288, 1292, §§ 157, 167; 7 R. C. L. pp. 1150, 1151, and cases cited.

In Colorado, however, eviction alone is not enough. If the grantee gets possession there must be a suit and neglect by grantor to defend after notice, in compliance with the statute above quoted. True, this court has said that even if the grantee gets possession yet if without fault on his part he is afterwards evicted by a paramount title and is actually out of possession his case is not within the statute, because his possession cannot be menaced and no legal proceedings for possession can be instituted against him. *Tierney v. Whiting*, 2 Colo. 620. But the present case is not within the reason of that decision because the plaintiff was in possession, his possession was menaced and legal proceedings might have been instituted against him.

It is contended that the state is presumed to be in possession, and that is true of all vacant state land, but it remains true that if the grantee is in actual possession he may be menaced in his possession and legal proceedings may be brought against him in respect thereto and therefore he is within the statute.

In his reply brief plaintiff in error claims that his case is not within the statute because the state might lawfully take possession without suit. If we should accede to that proposition we should be creating an arbitrary exception to the statute in violation of its plain requirement for a suit for possession and notice before suit on the warranty. The decision in *Tierney v. Whiting*, did not do this. It merely construed the statute, holding that it did not cover a case to which some of its terms could not apply; here all its terms are applicable.

In any case like the present, if the state or its patentee should bring suit for possession the covenantee could protect himself by notice to his covenantor and subsequent suit

on the covenant according to the statute; if, on the other hand, the state should take possession without suit, the covenantee would be actually out of possession, where the terms of the act could not apply, and so might maintain an action on the covenant according to the decision in *Tierney v. Whiting*. In either alternative he would be fully protected; but he may not purchase the paramount title because that is no more than a surrender, and a surrender to the paramount title will not, in Colorado, support a suit on a covenant of warranty or for quiet enjoyment. *Tierney v. Whiting supra. Seyfried v. Knoblauch*, 44 Colo. 86, 91, 96 Pac. 993.

Judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 10,108.

WILLOUGHBY v. WILLOUGHBY.

Decided May 1, 1922.

Action for divorce. Petition of defendant to set aside findings and conclusions, granted.

Affirmed.

1. **DIVORCE AND ALIMONY—Decree.** The innocent party in a divorce action cannot be forced to take a divorce against his or her will.
2. **Property Rights—Contract.** The dissolution of the marriage is no part of a contract settling the property rights of the parties.
3. **Party in the Wrong has no Vested Right in Interlocutory Decree.** In an action for divorce, plaintiff is entitled to a decree if he can prove his allegations; but if he withdraws his com-

plaint and the case proceeds upon the cross-complaint of defendant, he is left in the wrong and can have no vested right in any interlocutory decree against him based on his own guilt.

4. *Property Rights—Tender.* It is not necessary in a divorce proceeding, for a wife to tender a return of what has been paid her under a contract settling property rights, before she can petition the court to set aside findings in her favor, and dismiss her cross-complaint.
5. *Procedure—Setting Aside Findings—New Trial.* It is not necessary for the court after setting aside findings and conclusions in an action for divorce, to grant a new trial. The action may be dismissed on proper motion.
6. *Dismissal of Complaint—Collusion.* A complaint in a divorce action is properly dismissed, where it is withdrawn with the understanding that defendant will prosecute under her cross-complaint and if she fails to do so the complaint may be reinstated.

Such understandings are against public policy and void.

7. *Costs—Discretion.* Costs are within the sound discretion of the court, and unless the discretion is abused, orders relating thereto will not be disturbed on review.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. JOHN HORNE CHILES, Mr. JACOB L. SHERMAN, for plaintiff in error.

Mr. NATHANIEL HALPERN, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE district court granted the motion of defendant in error to set aside findings and conclusions and an interlocutory decree of divorce, rendered on her cross-complaint, dismissed the case and charged the costs to the husband, plaintiff below. He brings error.

Lou F. Willoughby brought suit against Gean S. Willoughby for divorce, alleging cruelty; she answered with general denial and added a cross-complaint for desertion.

The case was tried October 4, 1920. At the trial counsel for plaintiff stated that they desired to try the case on the cross-complaint, that it was not their purpose to rely on the complaint. No order was then made, however, dismissing the complaint, but the case proceeded to trial on the cross-complaint. On the following day the court signed the usual findings of fact, conclusions of law and interlocutory decree. When the six months was nearly gone defendant filed a petition under S. L. 1917, p. 184 § 10, to set aside the findings and conclusions on specified grounds, and prayed that the findings and conclusions be set aside and a new trial granted, for leave to amend her complaint to ask for separate maintenance, that if no amendment were allowed that the suit be dismissed without prejudice and that all contracts, if any, be set aside.

The plaintiff answered this petition with denials and set up a contract or stipulation with his wife made after her cross-complaint was filed, which, after reciting that plaintiff had brought suit, that defendant had filed a cross-complaint, that the parties had voluntarily settled their property rights and claims and that he had "fully informed the defendant of his exact financial condition, and the defendant is thoroughly conversant therewith, and each of the parties hereto have made a full statement of each other's rights," provided as follows:

"That for and in consideration of the sum of \$2000 to be paid by the plaintiff to the defendant in the sums of \$85.00 per month regular installments, the said defendant does hereby release and relinquish all her right, title and interest, claim and demand of any kind or nature whatever, in and to any property of the said plaintiff regardless as to whether or not the above entitled cause is dismissed and does hereby relinquish and forever discharge the plaintiff of and from any and all rights, claim or demand of the said defendant, which she might have as heir of the said plaintiff or otherwise, and should the said entitled cause be dismissed, and the said defendant survive the said plaintiff, this contract and stipulation may be exhibited in any court

of probate wherein the estate of the plaintiff may be filed for settlement as a full and complete bar against the defendant to the recovery of any part of the estate should the said defendant survive the said plaintiff."

"It is further stipulated and agreed that the above named plaintiff shall convey the premises known as 1351 Garfield street, together with all the furniture and furnishings therein contained to the defendant above named. It is further stipulated and agreed that the above named plaintiff shall cause to be dismissed that certain case now pending in the district court of Denver, Colorado, known as Mary E. Jewett vs. Mrs. L. F. Willoughby, case No. 72089, in Div. 3; that the said cause shall be dismissed with prejudice at the cost of the plaintiff in said cause; that on the trial of this cause if the decree be in favor of the defendant, the plaintiff shall pay counsel fees of the defendant to the extent of \$250.00 additional to that which has already been paid, and the court costs to be taxed in this suit."

He also alleged performance of this contract on his part up to that time.

The court without taking evidence granted the motion to set aside the findings and conclusions, but did not grant a new trial nor leave to amend nor leave to dismiss without prejudice, and did not set aside the contract. The order was as follows:

"This cause having been heretofore submitted to the court and by the court taken under advisement upon defendant's motion to set aside findings of fact and conclusions of law and dismiss case, and the court being now sufficiently advised in the premises, doth grant said motion and judgment of dismissal ordered entered as to the complaint and cross-complaint with prejudice as to both parties, but without prejudice on part of defendant to interpose a counterclaim based upon the same cause of action if plaintiff should hereafter sue upon the same cause of action, but this judgment of dismissal is not in any way to affect the rights of the parties or prejudice the rights

of defendant with reference to the stipulation concerning alimony heretofore entered into by the parties hereto."

The plaintiff moved for a final decree but the motion was denied.

The first and principal assignment is that the court erred in setting aside the findings and conclusions and in denying plaintiff's motion for a final decree. We think the court was right. To refuse would be to force defendant, the innocent party, to take a divorce against her will. *Milliman v. Milliman*, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. Rep. 181. We do not agree with plaintiff in error that S. L. 1917, p. 184, § 10 changes the law in this respect. We can see nothing to indicate such intention. Some other states hold likewise and some otherwise, but we agree with the principle on which this court rested the *Milliman* decision.

The plaintiff in error claims that the motion should not have been granted because its purpose was not to effect a reconciliation but to get more money out of him. That may have been its purpose, but without it, if she has good ground to annul the contract for alimony and to get more, she has a remedy even with the interlocutory decree or a final decree in force, and his protection against the injustice he fears is in a defense to such proceeding as she may institute to that end.

The dissolution of the marriage is no part of the contract. The contract would be unlawful if it were. It is a separate matter. The granting or denying the petition to set aside the findings, or the signing or refusing to sign the final decree can have no bearing on the contract. Were we to hold otherwise we should sanction the purchase of a divorce, which, however often it be done covertly, is a violation of law, public policy and decency.

A decree upon his complaint plaintiff was entitled to if he could prove the allegations, but having withdrawn it, he is left in the wrong. *Adams v. Adams*, 57 Misc. Rep. 150, 106 N. Y. Supp. 1064. He is the guilty party and can

have no vested right in any interlocutory decree against him based on his own guilt.

Plaintiff in error insists that defendant should have tendered a return of what he has given her and paid for her use pursuant to the contract. That may be true when she brings proceedings to annul the contract, but it follows from what we have said that it was not necessary for her to make such tender to support her proceeding to set aside the findings and dismiss her cross-complaint.

Counsel claim that under said section 10 of the act of 1917, the court, upon setting aside the findings must grant a new trial and cannot dismiss. That cannot be important because a plaintiff or cross-complainant could dismiss after the granting of a new trial.

It is urged that the court should not have dismissed plaintiff's complaint. That was done because the plaintiff in effect withdrew it and the court proceeded upon the theory that upon the withdrawal at the trial it ought then and there to have been dismissed. The court was right. The theory of the objection, when analyzed, is that since he withdrew his complaint upon an understanding that defendant would prosecute her cross-complaint, the complaint should be reinstated because she failed to keep her agreement. Such understandings are against public policy and void. If the complaint was false, for that reason it ought not to be reinstated, and if it was true, his understanding amounted to an agreement to give her a divorce to which she was not entitled and was therefore collusive, and for that reason the complaint ought not to be reinstated.

It follows from what has been said that plaintiff in error has no legal interest in the interlocutory decree or in the pendency of the suit. The only ground on which he claims such interest is his contract and partial performance thereof, and we have seen that any dependence of that contract upon the divorce would make it unlawful.

Plaintiff in error complains that the costs of the proceeding were charged to him. Costs are in the sound discretion

of the court and we cannot see sufficient reason for reversing the order.

Judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,110.

KLINE v. SMITH.

Decided May 1, 1922.

Action by wife for death of her husband in an automobile accident. Directed verdict for defendant.

Affirmed.

1. PERSONAL INJURIES—*Negligence—Directed Verdict.* Evidence in a personal injury case reviewed, and the action of the court in directing a verdict for defendant, on the ground that there was no negligence shown, and that there was contributory negligence, upheld.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOL, Mr. FRANCIS G. RICHE, for plaintiff in error.

Mr. REES D. REES, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE court directed a verdict for the defendant Smith in a suit by Mrs. Kline against him for negligently causing the death of her husband by running him down with an automobile. The court thought there was no negligence shown and that deceased had been guilty of contributory

negligence. The plaintiff brings error and claims that there was evidence of negligence and of proximate cause and not enough of contributory negligence to be conclusive.

We think the judgment was right, but even if not we cannot disturb it. The defendant testified that he was driving at night on Larimer street between 20th and 21st, at 12 or 15 miles an hour; that the street was brightly lighted; that he was looking straight ahead when the deceased, who was a street sweeper at work, suddenly appeared from the left, about two feet directly in front of the left of his vehicle and he was unable to stop before he had run over him. This testimony was undisputed. We can see no evidence here of want of care on defendant's part or of proximate cause, but much of contributory negligence.

The claim that defendant was so blinded by the wet pavement that it was a question for the jury whether he should have stopped his car is not supported by the evidence.

A vital part of the evidence showing how the accident happened was given by a Greek, the only eye witness on the stand except the defendant, by indicating, on the floor of the court room, just how the deceased stepped suddenly in front of defendant's machine. This evidence was also undisputed. The witness's gestures and indications are not reproduced in the record and yet they must have illustrated his words with great and perhaps with controlling force; we cannot, therefore, say that the direction of the court was wrong.

Judgment affirmed.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE ALLEN concur.

No. 10,114.

TENNIGKEIT v. WINEGAR, ET AL.

Decided May 1, 1922.

Action for assault. Judgment for defendants.

Affirmed.

1. APPEAL AND ERROR—*Fact Findings.* Findings of fact by the trial court, on conflicting evidence, will not be disturbed on review.
2. ASSAULT—*Evidence.* It appeared from the evidence that one of the defendants put his foot against a door in an effort to detain plaintiff and get him to surrender a deed which he had in his possession. Held, that the court was not bound to treat this as an assault.

*Error to the District Court of Kit Carson County, Hon.
J. W. Sheafor, Judge.*

Mr. FRANK L. HAYS, for plaintiff in error.

Mr. LOUIS VOGT, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for damages for assault. A trial to the court, without a jury, resulted in a judgment for defendants. The plaintiff sues out this writ of error.

The main contention is that the judgment is not supported by the evidence. The alleged assault took place in the office of one of the defendants. On the occasion that the assault is said to have taken place, the plaintiff and one of the defendants had some conversation regarding the land transactions mentioned in the opinion in cause No. 10,115, *Tennigkeit v. Bank, et al.*, 206 Pac. 798, filed at the same time as this opinion. The plaintiff testified to an assault, but from the evidence of defendants the court could find the contrary. One of the defendants put his foot

against the door in order to detain the plaintiff and get him to return or deliver up a deed which he had in his possession, but the court was not bound to treat this as an assault. The judgment has sufficient support in the evidence.

There was no reversible error in the admission of testimony.

The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,115.

TENNIGKEIT v. BURLINGTON STATE BANK, ET AL.

Decided May 1, 1922.

Action for breach of contract. Judgment for defendants.

Affirmed.

1. APPEAL AND ERROR—*Fact Findings.* Findings of fact by a jury, based on conflicting evidence, will not be disturbed on review.

Error to the District Court of Kit Carson County, Hon. J. W. Sheafor, Judge.

MR. FRANK L. HAYS, for plaintiff in error.

MR. LOUIS VOGT, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action upon a contract. The complaint alleges, in substance, that the defendant A. W. Winegar deposited with the defendant The Burlington State Bank the sum of \$500, and that it was agreed among these parties,

the plaintiff and the above named defendants, that this sum should be paid over to plaintiff in the event that defendant Winegar failed to transfer certain real estate to plaintiff. A breach of this contract is alleged. The answer admits the contract, but sets up a subsequent agreement between plaintiff and Winegar whereby the contract set up in the complaint was cancelled in consideration of Winegar's selling to plaintiff another tract of land. Compliance with such subsequent contract is then alleged. The replication denies that the second transaction was agreed upon as a substitute for the first. A trial to a jury resulted in a verdict for defendants, and plaintiff has sued out this writ of error.

The principal contention of plaintiff in error is to the effect that the verdict is not supported by the evidence. The issue of fact over which there is a dispute is whether plaintiff accepted the second conveyance as one in lieu of the former one contemplated in the contract he relies on, or whether it was a separate and distinct transaction. There is a conflict in the evidence, but there is sufficient evidence in the record to support a verdict for defendants.

Error is assigned to the admission of certain testimony. The abstract of the record, however, shows no reversible error.

The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,116.

SUNDIN v. FROST, ET AL.

Decided May 1, 1922.

Action to restrain the enforcement of an execution issued out of the district court upon a transcript of a judgment of a justice of the peace. Judgment of dismissal.

Reversed.

1. **DICTUM—Effect.** Where the writer of a judicial opinion discusses a question not involved, or necessary to the decision, the discussion can only be considered as expressing the views of the writer.
2. **JUDGMENT—Justice of the Peace—Limitation—Transcript in District Court—Execution.** A judgment of a justice of the peace, after it becomes dormant so that it affords no basis for an action, cannot be made the ground for an execution from the district court by filing a transcript of it with the clerk of that court.
3. **PLEADING—Limitation.** In a proceeding to restrain the enforcement of an execution issued upon a judgment upon which an action is barred by the statute of limitations, an allegation of the bar of the statute is sufficient as against a general demurrer.

Error to the District Court of the City and County of Denver, Hon. Henry J. Hersey, Judge.

Mr. BENJAMIN F. NAPHEYS, for plaintiff in error.

Mr. WILLIAM H. HUNT, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error was plaintiff in an action to restrain the defendants from enforcing an execution issued out of the district court. From the record it appears that in November, 1911, in a suit before a justice of the peace, a default judgment was entered against plaintiff in error, which judgment was later assigned to defendant in error Frost.

On the 9th of March, 1921, Frost caused a transcript of the judgment to be filed with the clerk of the district court, and secured immediately the execution which is now attacked. The complaint alleges that Frost filed the transcript and secured the execution with full notice that the judgment had expired by limitation. A general demurrer to the complaint was sustained. The plaintiff elected to stand on his complaint, and the cause was dismissed. The ruling on the demurrer is before us for consideration.

The question to be determined is whether or not an execution can be issued on a judgment of a justice of the peace, filed in the office of the clerk of the district court, after the time at which an action on the judgment is barred by the statute. Plaintiff in error urges that the policy of the law as to the enforcement of judgments is expressed in the statute, section 4061, R. S. 1908, which requires "all actions upon judgments rendered in any court not being a court of record" to be commenced within six years after the cause of action accrues.

Defendant in error on the other hand contends that an execution is not an action, and that courts have no authority to enlarge the statute of limitation, and make it apply by analogy to an execution. He depends upon the case of *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380, 23 L. R. A. (N. S.) 1096, 133 Am. St. Rep. 54. In that case a transcript of the justice court judgment was taken to the district court within a year after its rendition. In this case the justice court judgment was not recorded in the district court until nearly ten years after its rendition.

Section 3758, R. S. 1908, provides that a judgment thus recorded in the office of the clerk of the district court "shall

thenceforward have all the effect of a judgment of the said district court and execution shall issue thereon out of that court as in other cases."

It is urged that *Brown v. Bell* is not controlling because there the transcript had been filed while the judgment was still alive. The court, however, in its opinion, ignored the fact that the judgment had become in effect a district court judgment, and discussed the case as involving only a judgment of a justice of the peace. Counsel claim, therefore, that what was said in such discussion was mere dictum. Inasmuch as the discussion was of a question not involved in the case, or necessary to the decision, it can be considered only as expressing the views of the writer of the opinion. It should be observed also, that he misapprehended the case of *Parsons v. Wayne Circuit Judge*, 37 Mich. 287, and treated it as involving a statute which had in fact been amended. The Michigan case not only afforded no support to the opinion, but was directly contrary to it. The opinion relies upon *Waltermire v. Westover*, 14 N. Y. 16, in which the execution issued before the statute of limitations had barred an action, though the sale was after the bar took effect. The reasoning of the New York Court as applied to that question does not apply to the case of *Brown v. Bell*, nor to this case. *Brown v. Bell*, therefore, is not controlling. As we shall see, a later New York case is to the contrary.

The cases in which this question is considered, in many instances, involves statutes unlike our law, so that we get no help from them. In several cases, however, the question we are to determine has been decided on principle, and so furnishes a precedent. In the Michigan case, *supra*, the court, by Judge Cooley, held that an execution would not be allowed to issue after action on the judgment was barred. Although, in that case it was necessary, under the Michigan statute, to obtain an order for an execution, that fact is not material, since the court followed the case of *Jerome v. Williams*, 13 Mich. 521. There the ruling was based on the fact, as the court said, that a proceeding to

renew an execution is, in effect, "an attempt to establish a claim which could not be sued upon because barred by time." For that reason it was held the execution could not issue. In a later case, *Quinnin v. Quinnin*, 144 Mich. 232, 107 N. W. 906, the same rule is applied.

In *Price v. Wade*, 14 Ont. Pr. Rep. 351, it was held that an execution cannot issue after the time limited for the bringing of an action on the judgment. The court says that laws of limitation are laws relating to procedure, and "it would be most anomalous * * * to hold that a change of form in the application or method of procedure should work an essentially different change in the result."

In *McGrew v. Reasons*, 71 Tenn. 485, it is held that an execution is in effect an action on the judgment, and that the right to an execution expires with the loss of right of action on the judgment.

In *Williams v. Mullis*, 87 N. C. 159, it is held that a statute of limitations may be set up to defeat an application for an execution on a dormant judgment; that is to say, there is no right to an execution upon a judgment upon which action is barred by the statute of limitations.

In *Scammon v. Swartwout*, 35 Ill. 326, the court said that a statutory provision for reviving, or for bringing an action on a judgment within a prescribed time, implies that an execution cannot be issued at any later time; that it would be absurd to suppose that the law designed to give to an execution more vitality than the judgment on which it issued.

In *Herrman v. Stalp*, 6 N. Y. Supp. 514, it was held, that the judgment of the New York City District Court, a transcript of which was filed in the county clerk's office under a statute which provides that it shall thenceforward be deemed a judgment of the court of common pleas, does not authorize the issuance of an execution on such judgment after the judgment as originally rendered, was barred by the statute of limitations.

In *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829, it was held that a judgment of a justice court

which was barred by the statute at the end of six years, could not be set off against another judgment, although it had been filed in the county court under a statute which provided that a judgment so filed should be a lien upon real estate as if rendered in a court of common pleas. The court said that after filing it was not a judgment of the county court in fact, but a mere statutory judgment, subject to the bar which was applicable to it if it had not been filed. The court said:

"If the six-years limitation does not apply to such a judgment as this, then there is no limitation to an action upon such a judgment, as section 376 of the Code, providing that judgments shall be presumed to be paid and satisfied after the expiration of twenty years, applies only to judgments rendered in courts of record."

It further held that the offer to set off the judgment was, in a certain sense, an action to enforce the judgment against the defendant by compelling him to allow the same in satisfaction *pro tanto* of his judgment. "The judgment is the sole basis of the action, and in a real sense the action is to recover thereon."

If the use of a judgment by way of set-off is in any sense an action, it would appear that the enforcing of a judgment by execution might well be regarded as an action within the meaning of the statute of limitations. However, it is not necessary to determine that question in this case. It is sufficient to say that the judgment, after it became dormant, so that it afforded no basis for an action, could not be made the ground for an execution from the district court by filing a transcript of it with the clerk of that court.

It is further objected that there is no pleading of the statute of limitation. The right to a cancellation of the execution is asserted in the complaint upon the fact that the right to it had expired by limitation, and as against a general demurrer, the allegation of the bar of the statute was sufficient.

For the reasons above stated the judgment is reversed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,119.

FIRST NATIONAL BANK OF PLAINVILLE, KANSAS *v.* RILEY,
ADMINISTRATOR, ET AL.

Decided May 1, 1922.

Action on promissory note. Judgment for defendants.

Reversed.

1. PARTIES—*Deceased Defendant—Personal Representative.* While the personal representative of a deceased obligor cannot be joined with the survivor as a defendant in an action at law on a contract, the rule does not apply in a case where the deceased defendant is living at the time of the institution of the action. Upon his death, his personal representative may be substituted as a party under the provisions of section 15, code 1908.

Error to the District Court of El Paso County, Hon. John W. Sheafor, Judge.

Mr. GEORGE B. GOULD, for plaintiff in error.

Messrs. ORR & LITTLE, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action upon a promissory note and was brought against Mrs. E. A. Carlson and Enos Carlson, as joint makers. Each of the two defendants filed a separate answer. Thereafter, the defendant Mrs. E. A. Carlson died, and the administrator of her estate was, on motion of plaintiff and without objection of the other defendant, sub-

stituted as a party defendant. The defendant Enos Carlson then filed a demurrer to the complaint on the ground of "a defect and misjoinder of parties." The demurrer was sustained. Thereupon plaintiff offered to dismiss as to the administrator and to proceed against the other defendant alone. The court refused to permit plaintiff to proceed against such defendant. Plaintiff later asked leave to withdraw the dismissal as to the administrator, the vacation of the order sustaining the demurrer, and to reinstate the case against both defendants. This was refused. The record shows a dismissal as to the administrator, and a judgment for the defendant Enos Carlson. The plaintiff brings the cause here for review.

Error is assigned to the sustaining of the demurrer, and this question is argued by both sides. Counsel for defendant in error, the defendant below, Enos Carlson, in support of the demurrer, rely upon the cases of *Mattison v. Childs*, 5 Colo. 78; *Miller v. Blake*, 6 Colo. 118, and *Metz v. People*, 6 Colo. App. 57, 62, 40 Pac. 51. These cases apply the rule that the personal representative of a deceased obligor cannot be joined with the survivor as a defendant in an action at law on the contract. See also 24 C. J. 807, sec. 2027.

The rule above mentioned is not applicable in the instant case, for the reason that the administrator was not a party at the commencement of the action but was substituted in place of a deceased defendant who, before her decease, had filed an answer. The same situation existed in the case of *Morgan v. King*, 27 Colo. 539, 63 Pac. 416, and this court there said:

"The action commenced against deceased did not abate by reason of his death. It became the duty of the administrator to defend. Under our code (sec. 15), he was properly made a party defendant. The misjoinder which may be taken advantage of by demurrer, if it appears upon the face of the complaint, or by answer if not, does not apply to cases where an administrator is substituted in place of a deceased defendant. * * *

"The administrator being a proper party defendant, it

necessarily follows that a judgment could be pronounced against him in his representative capacity."

Section 15 of the Code of 1908, mentioned in the foregoing quotation, provides that "an action shall not abate by the death * * * of a party, * * * if the cause of action survive or continue," and that "in case of the death * * * of a party, the court, on motion, may allow the action to be continued by, or against, his representative." Such provision is not limited to cases where there is but one plaintiff or one defendant. See, also, 1 C. J. 161; 24 C. J. 808, note 27.

It was error to sustain the demurrer. The judgment is reversed, and the cause remanded with directions to overrule the demurrer, reinstate the cause, and permit plaintiff to proceed against both defendants.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,142.

UNION HEALTH AND ACCIDENT CO. v. WELCH.

Decided May 1, 1922.

Action on accident insurance policy. Judgment for plaintiff.

Reversed.

1. **INSURANCE—Accident Policy—Limitation.** An accident insurance policy is not a life insurance policy within the meaning of section 44, chapter 99, S. L. 1913, and division 2 of the section has no application to such policies.
2. **Adjudicated Cases.** Judgment reversed on authority of Midland Casualty Co. v. Frame, 67 Colo. 179.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. ISHAM R. HOWZE, for plaintiff in error.

Messrs. LEWIS & GRANT, Mr. ALBERT G. CRAIG, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action by a beneficiary under a contract of insurance in the form of a policy commonly known as an "accident policy." The insured suffered death as the result of a bodily injury sustained through external, violent and accidental means, and plaintiff, his beneficiary, seeks to recover the indemnity provided by the contract for loss of life. There was a judgment for plaintiff, and defendant, the insurer, brings the cause here for review.

The only question that need be determined is the validity of the defendant's first defense, which is the claim that the action is barred by reason of the following facts: The action was brought after more than six months had elapsed since the filing of the proof of death. The policy contains a limitation clause, as follows:

"Legal proceedings for recovery hereunder shall not be brought before three months nor after six months (unless otherwise provided by statute, in which case such action must be brought within the statutory limits) from the date of filing such proof at the Home Office of the Company."

The limitation clause would be void if the contract is, as the trial court held, one of life insurance within the meaning of section 44, chapter 99 of the Session Laws of 1913. That such a contract as the one involved in the instant case is not a life insurance policy within the meaning of the Act of 1913 has been decided by this court in *Midland Casualty Co. v. Frame*, 67 Colo. 179, 185 Pac. 656. That case is decisive of the instant case. For the reasons stated in the opinion in the *Frame* case, it was error not to render judgment for defendant upon the defense above mentioned.

The judgment is reversed and the cause remanded with directions to dismiss the action.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,235.

SULLIVITCH v. THE PEOPLE.

Decided May 1, 1922.

Plaintiff in error was convicted of a violation of the prohibition act.

Affirmed.

1. INTOXICATING LIQUORS—*Search and Seizure—Home.* The evidence disclosed that there was nothing in the basement of a dwelling-house except a vat of "mash", an empty tank and some kegs. Held that there was nothing to show that it was used for the ordinary purposes of a cellar in connection with a home, which would make it exempt from search without a warrant under the provisions of section 13, chapter 141, S. L. 1909.
2. APPEAL AND ERROR—*Findings.* Fact findings by the trial court, justified by the evidence, will not be disturbed on review.
3. *Judgment—Deficient Abstract—Presumption.* It nowhere appearing in the abstract of record that it contains all of the evidence before the jury, all presumptions are in favor of the verdict and judgment, which will not be disturbed on review.

Error to the District Court of Mesa County, Hon. Straud M. Logan, Judge.

Mr. M. D. VINCENT, Mr. C. T. VINCENT, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, for the people.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was convicted of having in his possession intoxicating liquors, he having previously been convicted of unlawfully manufacturing intoxicating liquors for sale or gift. He brings error and contends that the court erred in admitting evidence found and seized in an unlawful search in his house and home; that the testimony of the sheriff and deputy sheriff based upon knowledge obtained by unlawful entry and search and seizure is incompetent, and that the evidence does not support the verdict.

Prior to the trial plaintiff in error filed a petition in the district court asking for an order upon the sheriff to return to the petitioner such personal effects as he had seized and carried away upon a search of the plaintiff's premises without a warrant. From the abstract of record, it is impossible to determine what this personal property was, except by inference from some general statements. It appears, however, to have been either wine or whisky, perhaps both.

Reference is made in the testimony to "mash" in the basement under the room occupied by defendant as a residence; also to wine making. From a statement of the case by counsel for plaintiff in error, it appears that grapes, or grape juice in the process of fermentation, and a small quantity of wine were found in the cellar. There is no evidence that there was anything in this basement except a vat of "mash," an empty tank, and some kegs. There is nothing to show that it was used for the ordinary purposes of a cellar in connection with a dwelling house. It appears, then, that the trial court was justified in finding that it was not a part of the home, but was in effect a wine-shop. At all events, there is nothing before us which would justify us in disregarding the court's findings.

By section 13 of chapter 141, Laws of 1919, it is provided that a sheriff or other officer "having personal knowledge, or reasonable information, that intoxicating liquors have been kept in violation of law in any place (except a home as in section 4 provided) shall search such suspected place without a warrant, etc."

Under the findings of the trial court, a part, at least, of the evidence whose competency is questioned, was taken from a place in which the sheriff might lawfully make search without a warrant, he having reasonable information that intoxicating liquors were kept in such place. As to liquor taken from the place occupied as a residence, if any of it was offered in evidence, that fact is not made to appear in the abstract of the record. Counsel's principal contention is that, the search being made without a warrant, any evidence found was incompetent, the return of such evidence having been seasonably demanded. In this record it not appearing that such evidence was admitted, the question discussed is not before us. The presumptions all being in favor of the judgment, and it no where appearing in the abstract that it contains all of the evidence before the jury, the verdict and judgment must stand.

The judgment is accordingly affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,280.

CRAWFORD, ET AL. v. THE INDUSTRIAL COMMISSION, ET AL.

Decided May 1, 1922.

Proceeding under the workmen's compensation act.
Claim for compensation denied.

Reversed.

1. WORKMEN'S COMPENSATION—*Industrial Commission—Findings.* In a proceeding under the Workmen's Compensation act, it is the duty of the industrial commission to make sufficient specific findings of fact, and where it fails to do so, a cause which has been brought to the supreme court for review, will be remanded for further proceedings.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

MESSRS. TOLLES & COBBEY, for plaintiffs in error.

MR. L. WARD BANNISTER, MR. SAMUEL M. JANUARY, MR. WM. T. WOLVINGTON, MR. VICTOR E. KEYES, attorney general, MR. JOHN S. FINE, assistant, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

ON January 5, 1921, there was filed with the Industrial Commission of Colorado by Mrs. M. C. Crawford on behalf of herself and her daughter Helen Crawford fourteen years of age, a certain "dependents notice and claim for compensation" from which it appears that claimants are the mother and sister respectively of Robert Elwood Crawford, deceased, who was born February 14, 1903, was employed by defendant M. D. Neusteter Company at Denver, Colorado, on May 22, 1920, the date of the accident; that said accident was caused "in running an elevator" and the nature of the injury "burns and shock caused by electricity;" and that the injured employee died November 13, 1920.

July 29, 1921, the Commission made and filed its "findings and award," the material portion whereof reads:

"That Robert Elwood Crawford, now deceased, filed his claim for compensation May 29th, 1920, alleging that he was injured May 22nd, A. D. 1920, while working for the above named employer at Denver, Colorado, and while operating an electric elevator, and that while so operating

said elevator and while he was within said elevator, that he sustained a shock from the electrical apparatus, causing injury to the left eye and further derangement to his entire system. That this claim was denied by the Referee October 8th A. D. 1920. That thereafter claimant died, his death occurring November 13th, A. D. 1920:

That on January 5th, A. D. 1921, his mother, Mrs. M. C. Crawford, on behalf of herself and a minor sister of the decedent, filed a dependents' notice and claim for compensation. That at the hearing held on such claim, the claimants relied upon the testimony heretofore submitted in support of their contention, that the death of the said Robert Elwood Crawford was the proximate result of his injuries of May 22nd, A. D. 1920, and by stipulation of the parties hereto, the evidence taken at the former hearing held upon the claim of Robert Elwood Crawford was made a part of the record in this cause.

The Referee is of the opinion that Robert Elwood Crawford from and after May 22nd, A. D. 1920, was suffering from an injury caused by an electric shock, and that his death on November 13th, A. D. 1920, was the proximate result of an electric shock sustained by the said Crawford. The Referee, however, is unable to find from the evidence that the shock sustained by the decedent, Crawford, was sustained in the manner and at the time and place alleged by the claimants herein. Proof as to the possibility of sustaining an electric shock in the manner and at the time and at the place alleged by the decedent himself clearly and positively precludes the possibility of finding that the shock from which Crawford was undoubtedly suffering could have been sustained as he alleged. It, therefore, follows that the claim for compensation must be denied."

Claimants thereafter brought this action in the district court to vacate and set aside said award. The court confirmed the findings and award of the Commission. To review that judgment this writ is prosecuted.

The only grounds upon which a decision of the Commission can be reversed by the District Court are:

"(a) That the Commission acted without or in excess of its powers;

(b) That the finding, order or award was procured by fraud;

(c) That the findings of fact by the Commission do not support the order or award." Sec. 103, Laws of 1919, p. 743.

"Questions of law only" can be reviewed by us on writ of error. Sec. 108, Laws of 1919, p. 744.

Among the allegations in the complaint are: "(a) That the Industrial Commission acted without and in excess of its powers as follows: * * *

(8) That the Industrial Commission and its Referee have made insufficient findings of fact.

(b) That the findings of fact of the Industrial Commission do not support its order or award in that; * * *.

(7) That the Industrial Commission has made insufficient findings of fact upon which to base its award."

The duty of the Commission to make specific findings of fact as the foundation of its award, that this court may determine the validity of the award itself therefrom, has been repeatedly pointed out. *Prouse v. Industrial Commission*, 69 Colo. 382, 384, 194 Pac. 625; *Weaver v. Industrial Commission*, 69 Colo. 507, 194 Pac. 941; *Olson-Hall v. Industrial Commission*, 69 Colo. 518, 194 Pac. 212.

It would seem that this court has failed to make itself clear, despite its somewhat vigorous criticisms of findings of fact heretofore certified to us, or that there exists an inexplicable negligence on the part of the Commission, or its referees, in discharging their duty under the statute and the authorities.

Whether it was the intention of the referee herein, in the first paragraph of his findings, to refer to the *claim* of the deceased or his *testimony* as "alleging" the matters therein mentioned, does not appear from the findings. The only important finding of fact is a negative, i. e., The inability of the referee to find from the evidence of claimants that the shock sustained by decedent was sustained "at the

time and place alleged by the claimants." Whether this means alleged by the claimants in their *statement* or by the *testimony* of their witness, the deceased, does not appear. We get the impression that the referee intends to hold that a failure to find that this accident occurred at the precise time and place and in the exact manner stated in the testimony of deceased precludes recovery by these claimants. If so we are not prepared to agree with him.

It becomes absolutely essential that the Commission make some definite findings of fact herein. We are told that deceased was suffering from this shock "from and after May 22nd." When did he get it? Where did he get it? How did he get it? Having found these facts in detail the Commission may draw its conclusions therefrom as to whether, at the time of the accident, the employee was "performing service arising out of and in the course of his employment," which is the test of right of recovery, and make its award accordingly. From the facts so found we can then, and not till then, determine the correctness of the Commission's conclusion and the support, if any, which such facts furnish for the award.

The judgment is reversed and the cause remanded to the District Court with directions to send it to the Commission for compliance with the law.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,314.

DROTT v. THE PEOPLE.

Decided May 1, 1922.

Plaintiff in error was convicted of burglary and larceny.

Reversed.

On Application for Supersedeas.

1. **CRIMINAL LAW—Limitations.** Where a criminal information charges grand larceny, that will not prevent the operation of the statute of limitations where the offense proves to be of a lesser grade, prosecution for which is barred by the statute.
2. **Burglary and Larceny—Evidence.** In a trial for burglary and larceny, evidence concerning articles not properly involved in the transaction, and which would prejudice the jury, should be excluded.
3. **Evidence—Order of Proof.** In a criminal case it is error to permit the introduction of testimony in rebuttal, which is clearly a part of the state's evidence in chief.

*Error to the District Court of Montrose County, Hon.
Thomas J. Black, Judge.*

Messrs. MOYNIHAN, HUGHES, KNOUS & FAUBER, for plaintiff in error.

No appearance for the people.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error was convicted under both counts of an information charging him, first, with burglary, and, second, with grand larceny. The information charged that these offenses were committed on the 29th day of November, 1917. The information was filed on the 22nd day of

November, 1920. The conviction under the second count was of larceny of goods of the value of \$17.60. The offense was therefore a misdemeanor.

For the plaintiff in error it is contended that more than eighteen months having elapsed after the time at which the offense of larceny charged in the second count was committed, the case was barred by section 1949, R. S. 1908, which requires prosecution for a misdemeanor to begin within eighteen months from the time of the committing of the offense.

The language of the statute is perfectly clear, and although the offense charged was grand larceny, that does not prevent the operation of the bar of the statute. To prevent the operation of the bar by charging a crime of a higher grade not within the bar would nullify the statute. The prosecution being barred, the conviction on the second count was void. *Hammock v. State*, 116 Ga. 595, 43 S. E. 47; *People v. Di Pasquale*, 161 App. Div. 196, 146 N. Y. Supp. 523; *People v. Picetti*, 124 Cal. 361, 57 Pac. 156.

It is further contended that the conviction under the first count should be set aside because of the admission of improper evidence over the objection of the defendant. It appears that on a search of defendant's premises, under authority of a search warrant, several small tools were found, a few of which were identified as having been in the house of the prosecuting witness at the time of the supposed burglary. There was also found a saddle and wagon box, and identified by the prosecuting witness as his property, although there was no evidence as to when, or from what place the saddle and wagon box were taken from his possession. There was extensive examination of witnesses upon the question of ownership, and identification, and upon the destruction of the wagon box by fire. The court instructed the jury that the possession of the saddle, wagon box and certain wringers could not be considered by the jury as evidence of burglary or larceny. It being plain from the record that the matter of the saddle, wagon box and wringers was not entitled to be con-

sidered in the case, the state should not have introduced evidence concerning them, because such evidence inevitably prejudiced the jury in spite of the court's instructions.

The prosecuting witness was allowed to testify in rebuttal as to an explanation made by the defendant of his possession of the saddle, though that evidence was clearly a part of the evidence in chief. Its admission was error. *Hardesty v. The People*, 52 Colo. 450, 121 Pac. 1023.

The court's instructions were extremely full and we find no error in them. It is difficult to see how the jury, under the instructions, found the defendant guilty.

The attorney general declines to file a brief herein.

For the reasons above stated the judgment is reversed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,315.

ELLISON v. YOUNG.

Decided May 1, 1922.

Action in replevin. Judgment for defendant.

Affirmed.

On Application for Supersedeas.

1. **CONTRACT—Construed.** Contract construed and held not unilateral nor lacking in mutuality, and valid and binding.
2. **Consideration.** A contract may be valid, even if no part of the consideration appears upon its face.
3. **PLEADING—Form—Name.** The demands set out in a pleading are not to be defeated by mere misnomer or bad form.
4. **COUNTER-CLAIM—Nature of.** Under the provisions of section 63,

code 1908, a claim based upon contract may not be set up as a counter-claim in an action founded upon tort.

5. **APPEAL AND ERROR—*Fact Findings.*** Findings of fact by the trial court which are supported by sufficient evidence, will not be disturbed on review.

Error to the District Court of Garfield County, Hon. John T. Shumate, Judge.

Mr. W. D. LOMBARD, Mr. C. B. HORN, Mr. EUGENE D. PRESTON, for plaintiff in error.

Mr. JOHN L. NOONAN, Mr. W. F. NOONAN, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

THE parties plaintiff and defendant in the trial court occupy the same respective position here and are so hereinafter referred to.

This was an action in replevin. The property taken from the defendant under the writ was ordered returned to him by the court and he was given judgment in the sum of \$1,822 damages for plaintiff's wrongful detention thereof. To review that judgment plaintiff prosecutes this writ, and asks the issuance of a supersedeas.

April 6, 1918, the parties hereto entered into the following contract which, for convenience, will be referred to as Exhibit "A".

"This agreement between W. S. Ellison of the first part and Ward P. Young of the 2nd part to hereby agree to as follows Ellison to lease his ranch 8 miles North of Debeque, Colo. in Garfield Co. for a term of 3 years with option of 5 years to Ward P. Young of the 2nd part: Party of the first part to give use of horses harness and machinery and the tools found thereon. Also 6 cows and two calves to be shipped from Denver, Colo. to Debeque in car with said W. P. Youngs of 2nd part stock and furniture and add more up to 12 when convenient. Also furnish 2

Brood sows bringing pigs somewhere in next two months from April 1st. The party of the 2nd part agrees to do all work customary on Ellison farm including keeping up fences and changing same. Also do all ditch work required for watering of crops & orchard on Ellison ranch. Said Young of 2nd part to have all garden and fruit for family use needed all over for commercial use to be divided equally. The party of 2nd part to take care of all stock. Said Young to receive $\frac{1}{2}$ of increase of calves and pigs from cows and sows furnished by Ellison of the first part. W. P. Young to furnish feed for $\frac{1}{2}$ cows sows and pigs, said Young of 2nd part to furnish 2 horses, wagon and harness, 1 riding plow and also further agrees to put in 20 acres of alfalfa in present year of 1918. Said Ellison to furnish seed for same.

Said Young of 2nd part agrees to plow up and put in cultivation all lands that can be put under ditch during term of lease.

Ellison of 1st part to feed 4 horses including two of Ellison to be left on ranch. Ellison also to receive $\frac{1}{2}$ of butter fat.

Machinery left.

W. S. Ellison

W. P. Young.

The original complaint alleged that under this contract defendant obtained possession of the property therein mentioned; that the contract was intended as a lease of said ranch and personal property; that it was void because unilateral and "signed by plaintiff through mistake and error." Of what this "mistake and error" consisted or how it arose we are not apprised. A general demurrer to the complaint was sustained. The ruling was correct and should have terminated the case. Leave having been given to amend, an amended complaint was filed from which Exhibit "A" was omitted, as was also the allegation that possession was taken under it. Thereupon defendant filed his "amended answer and cross complaint" admitting plaintiff's ownership of the property and pleading Exhibit "A"

as justification for defendant's possession. The cross complaint sets up in detail plaintiff's alleged violation of the contract, his wrongful seizure and detention of the property, and defendant's claim for damages by reason thereof. The "replication to amended answer and answer to cross complaint" admits the execution of Exhibit "A" but denies its legality, in substance as in the original complaint, denies the alleged violation thereof and the damages, and by way of cross demand sets up the execution and delivery to plaintiff by defendant of a promissory note for \$325 and prays judgment thereon for \$296 (the unpaid balance) and interest. Defendant thereupon moved for judgment on the pleadings which motion was sustained in this:

"That plaintiff take nothing by his complaint or amended complaint herein, that the same and each of them be dismissed and held for naught, and that defendant have judgment against said plaintiff according to the prayer of his amended answer, for the return of his personal property," etc., and for costs.

Thereupon a jury was waived and the remaining issues tried to the court which disallowed plaintiff's cross demand on the promissory note and otherwise gave judgment as herein above recited.

BURKE, J., after stating the facts as above.

Plaintiffs only contentions deserving of notice are: 1. That the contract was unilateral and void; 2. That defendant's cross complaint for damages could not be sustained in a replevin action; 3. That plaintiff's cross demand on the promissory note was erroneously excluded by the court; 4. That the judgment for damages is unsupported by the evidence.

1. Exhibit "A" was in the handwriting of plaintiff himself. No fraud, deception, mistake or error is alleged in its execution. It is not unilateral nor lacking in mutuality and for aught disclosed by this record is valid and binding, and the court correctly so held. From an inspection of this

contract and an examination of the evidence relating to it, it would appear that the whole consideration was not expressed therein, in that in addition thereto there was an agreement between the parties for an equal division of crops to be grown on the leased premises other than those mentioned in the contract. But as this was conceded by defendant and considered by the court plaintiff cannot be heard to complain thereof. The contract might be valid if no part of the consideration appeared upon its face. 13 C. J. p. 367 sec. 240.

2. While defendant's demands (other than for return of the property) are denominated "further answer," "cross complaint," and "separate and further cause of action," all are in fact for damages for wrongful taking and detention, recoverable under section 246 Civil Code, 1908. They are not to be defeated by mere mis-nomer or bad form.

3. By Section 63 Civil Code, 1908, a counterclaim or cross demand such as plaintiff sets up by replication, must either arise out of the transaction or arise upon contract and be set up against a demand arising also upon contract. No attempt is made in the pleading to connect the promissory note with anything set out in the amended complaint; and as plaintiff's cause of action, if any he had, was founded upon tort, no claim based upon contract could be so adjudicated on that ground.

4. On the question of damages it is enough to say that the facts were for the court and the evidence is sufficient to support the findings.

Other alleged errors might require consideration had the trial been to a jury but under the present circumstances they are deemed immaterial.

The supersedeas is denied and the judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,325.

THE PEOPLE, EX REL. ADAMS HOTEL CO., ET AL. v. DISTRICT COURT OF THE CITY AND COUNTY OF DENVER, ET AL.

Writ of Prohibition Granted April 17, 1922.

Original Proceeding.

1. PROHIBITION—Writ—When Granted. Where the complaining party has no adequate and speedy remedy against the unwarranted action of a trial court except prohibition, the peremptory writ will be granted.

Mr. HENRY E. LUTZ, Messrs. DANA, BLOUNT & SILVERSTEIN, for petitioners.

Mr. THOMAS E. WATTERS, Mr. PERCY S. MORRIS, for respondents.

En banc.

PER CURIAM.

Assuming, but not deciding, that the district court had jurisdiction in reinstating the case of *T. C. Jones v. The Adams Hotel Company, etc., et al.* (No. 75952 in that court) and in appointing a receiver therein, on motion of The Eldorado Springs Resort Company, not a party to the action, still it is apparent that it exceeded its legitimate powers in this behalf, and since there is no adequate and speedy remedy to the petitioners against the unwarranted action of the court except by prohibition, the peremptory writ is ordered, directing that no further action by the court be taken in such causes, except the entry of an order of dismissal thereof and the discharge of the receiver. *McInerney v. City of Denver*, 17 Colo. 302, 304, 29 Pac. 516.

All costs and expenses of such receivership, and all costs in the case itself accruing since its reinstatement, to be taxed against The Eldorado Springs Resort Company.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD not participating.

No. 10,006.

WATSON, ET AL. v. WOODLEY, ET AL.

Decided May 1, 1922. Rehearing denied June 5, 1922.

Action for specific performance. Nonsuit and judgment for defendants.

On Petition for Rehearing.

Affirmed.

1. **APPEAL AND ERROR—Nonsuit.** Evidence reviewed and the action of the court in granting a nonsuit, upheld.
2. **PRINCIPAL AND AGENT—Ratification.** If a principal with full knowledge of all the material facts, takes and retains the benefits of an unauthorized act of an agent, he thereby ratifies such act; but the evidence must be sufficient to establish the facts necessary to show ratification.
3. **BILLS AND NOTES—Check—Indorsement.** The indorsement of a check alone is no evidence that the indorser received any benefit from it.
4. **WITNESSES—Against Heirs or Representatives—Competency.** In an action where one is defending as an heir or legal representative, a witness who is incompetent against the heir or representative, under the statute, may be competent to testify against other defendants in the action, who are not representatives or heirs.
5. **APPEAL AND ERROR—Harmless Error.** The erroneous exclusion of testimony is harmless error, where the evidence which would have been given by the witness, was of facts admitted by the pleadings.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Messrs. MURRAY & INGERSOLL, Mr. JOHN L. SCHWEIGERT, Mr. HARRY C. RIDDLE, for plaintiffs in error.

Mr. JACOB S. SCHEY, Messrs. ROTHGERBER & APPEL, Mr. L. F. TWITCHELL, for defendants in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit in which the principal relief sought is the specific performance of an alleged contract to sell and convey land. On motion of defendants, a nonsuit was granted against plaintiffs, and judgment was thereafter rendered for defendants. The plaintiffs bring the cause here for review.

Error is assigned to the granting of the nonsuit. The ultimate question of fact involved, so far as the motion is concerned, is whether the defendant F. P. Woodley, who is sued as the vendor under the alleged contract, ratified the contract upon which this suit is predicated.

The contract in question purports to be one between vendor and vendees of land. The plaintiffs are the vendees, and sue as such. On the part of the vendor, the contract was signed in the name of the defendant F. P. Woodley by one J. T. Sanderson who assumed to act as Woodley's agent. Sanderson was not authorized to do so; hence arises the question of Woodley's subsequent ratification of the contract.

The contract provided for an initial payment of \$5,360 to Woodley, as vendor, by plaintiffs, as purchasers. The plaintiffs executed their certified check for that amount, making the same payable to F. P. Woodley, and delivered it to Sanderson. Sanderson was not a witness. There is no testimony by him as to what he or Woodley did with reference to the check. The check returned to the plaintiff's bank, having been paid in the usual course. It bore Woodley's endorsement, as follows: "Pay to the order of J. T. Sanderson.

F. P. Woodley."

On the face of the check was the memorandum: "Cash payment for 640 acres of land."

The foregoing facts are substantially all that was shown as evidence of Woodley's alleged ratification. It is true that if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of an agent he thereby ratifies such act (2 C. J. 493), but plaintiffs' evidence is insufficient to make out a case within this rule. We concur in the statement of the trial judge, appearing in the record as follows:

"There is no testimony here showing that Mr. Woodley knew of the existence of that contract, or its terms. It is a matter of mere conjecture to say that when he endorsed the check he received the money, or that he adopted or ratified the contract."

As a further observation, we may add that there is no evidence from which it may be determined whether Woodley endorsed the check, in the usual course of accepting it, or endorsed it merely that it, being a certified check, might be returned to and cashed by plaintiffs. There is no evidence that he received any benefit on account of the check. The trial court, sitting without a jury, was warranted in regarding plaintiffs' proof as failing to show Woodley's ratification of the contract. There was no error in granting the motion for a nonsuit.

Error is assigned to the court's sustaining an objection to allowing the plaintiff Dudley D. Watson to testify as a witness. The objection was sustained on the theory that the witness was incompetent for any purpose because an adverse party was defending as heir or legal representative of the defendant F. P. Woodley who died prior to the trial of this cause. This was error. The plaintiff would be a competent witness against other defendants who are not legal representatives or heirs and who were present at the trial in person and by counsel. The witness was not incompetent for all purposes. *Nesbitt v. Swallow*, 63 Colo. 194, 164 Pac. 1163, followed in *Gabrin v. Brister*, 65 Colo. 407, 177 Pac. 134.

The record shows, however, that this error was harmless, for the reason that most, if not all, of the evidence

which would have been given by the witness was of facts admitted by the pleadings. Furthermore, the other defendants were interested as Woodley's subsequent purchasers, and proof of any facts affecting them would be immaterial unless plaintiffs establish a cause of action against Woodley, and this they have not done.

The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

MR. JUSTICE BURKE agrees with the conclusion.

No. 10,027.

GLENN v. MITCHELL, ET AL.

Decided May 1, 1922. Rehearing denied June 5, 1922.

Petition to vacate an order admitting a will to probate.
Judgment for defendants.

Reversed.

1. **STATUTES—Construction.** Section 7096, R. S. 1908, regarding the probate of wills, involves no question of jurisdiction, it is merely regulatory.
2. **COURTS—County Court—Jurisdiction.** County courts are courts of record having general jurisdiction which is unlimited in the determination of matters growing out of the settlements of estates.
3. **Power to Revoke Probate of Will.** The county court as a court of probate, may, on proper grounds, revoke the probate of a will.
4. **LIMITATIONS—Statutes—Construction.** A statute of limitations should not be applied to cases not clearly within its provisions.

5. WORDS AND PHRASES—"Determined", in a judicial proceeding, means adjudicated on an issue presented.
6. STATUTES—*Limitation—Construction*. Section 7096, R. S. 1908, concerning the probate of wills and conclusiveness thereof, construed, and held not to bar an action, commenced after the one year period, to vacate an order admitting a will to probate, it being alleged that the execution of the will was induced by fraud and misrepresentation.
7. FRAUD—*Judgment—Attack*. The right to make a direct attack upon a judgment obtained by fraud, is not to be denied.

Error to the County Court of the City and County of Denver, Hon. Ira C. Rothgerber, Judge.

Mr. N. WALTER DIXON, Mr. THOMAS J. DIXON, for plaintiff in error.

Messrs. DINES, DINES & HOLME, Messrs. LEWIS & GRANT, Mr. WALTER M. APPEL, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error on November 14, 1918, filed her petition in the county court to vacate an order entered November 22, 1915, admitting to probate the will of Dennis Sullivan, deceased.

It is alleged in the petition that the testator had executed a will in 1913, whereby the petitioner and her sister were made residuary legatees of the estate of said Sullivan; that thereafter the said John C. Mitchell, and others associated with him, by fraud and misrepresentation, induced the said Sullivan to make a new will whereby the said John C. Mitchell, as residuary legatee, received the bulk of the estate of the said testator, while the petitioner and her sister received but a small legacy each.

A demurrer to the petition was sustained, the petitioner elected to stand upon her petition, and judgment was entered in favor of the defendants.

Counsel agree that the demurrer was sustained under

the provisions of section 7096, R. S. 1908, but differ as to the real ground of the court's ruling.

For plaintiff in error it is contended that the court held the suit barred by the statute, because not begun within one year from the order of probate, while counsel for defendants in error insist that the only question raised under the statute, and determined by the court, was that of jurisdiction. Said statute reads as follows:

"In all actions wherein the execution or contents of any last will may be brought in question, the record of the probate of such will, or an exemplified copy of such record, shall be conclusive proof of the execution and also of the legality and validity of the contents thereof, in so far as the same were determined at the probate, both as against the persons summoned and appearing at the probate thereof and as against all other persons; *Provided*, That any heir at law, legatee, devisee, or other person interested to prove or contest the said will, who was not summoned by actual service of process, and who did not appear at the probate of such will, may at any time within one year after the admitting of such will to probate, appear in the county court of the county wherein such will was presented for probate, and contest the validity of such will, or propound the same for probate as in an original proceeding for probate; but if no such person shall appear within the time aforesaid, the probate, or refusal thereof, shall be forever binding and conclusive on all the parties concerned saving to infants, or persons *non compos mentis*, the like period after the removal of their respective disabilities."

Counsel for defendant in error assert that this statute is so like the Illinois statute on the same subject that a construction of the latter statute by the supreme court of Illinois determines this case. They cite *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166, a case in which a will was attacked on the ground that the testator was induced by fraud to make it. We do not agree with counsel either that the laws are similar, or that the Illinois case is au-

thority on the question now before us.

The Illinois statute provided that, if within three years of the probate of a will in the county court, a contest thereof was begun in the county court by a bill in chancery, an issue of law should be made up and tried by a jury in the circuit court.

In the case cited the court held that, inasmuch as the general jurisdiction of courts of equity does not, independent of statute, extend to the probate of wills, or the setting aside of wills, the statute in question gave to the circuit court jurisdiction only for the period limited by its terms; that of contest begun after the lapse of the three years after probate, the circuit court had no jurisdiction.

The situation here is very different. The county court is given jurisdiction of probate matters by section 23 of article VI of the Constitution, and the statute now under consideration involves no question of jurisdiction. It is merely regulatory, determining the period in which an order of probate may be attacked, under circumstances named, and the conclusiveness of such probate, if not so questioned.

Our county courts are courts of record, and "of superior or general authority." *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 647. They have the powers incident to such courts, including the right to vacate judgments obtained by fraud.

In *Lusk v. Kershow*, 17 Colo. 481, 30 Pac. 62, speaking of the county court, it is said:

"It is a court of general jurisdiction, and this jurisdiction is unlimited in the determination of matters growing out of the settlement of estates."

In *Clemes, Adm'r v. Fox*, 25 Colo. 39, 53 Pac. 225, this court said:

"Whatever may be the law in England, or in other states of the Union, we are clearly of the opinion that, under our Constitution and statutes, the county court, in all matters pertaining to probate business, has as ample

powers and as full jurisdiction with respect thereto as have the district courts of this state over matters within their jurisdiction. Constitution art. VI, sec. 23; Mills' Ann. Stats. sec. 1054; *Schlink v. Maxton*, 153 Ill. 447."

This power is recognized in other jurisdictions as belonging to county courts generally, and as courts of probate.

In *the Matter of the Estate of Fisher*, 15 Wis. 511, it is expressly held that:

"The county court, sitting as a court of probate, may, at any time, in furtherance of justice, revoke an order which has been irregularly made or procured by fraud."

In *Marston v. Wilcox*, 1 Scam. 60, the supreme court of Illinois held that the circuit court erred in reversing a court of probate which had revoked letters of administration obtained by fraudulent representations. The court said that if letters be obtained by a fraudulent representation, to inquire whether any fraud has been practiced is a necessary incident to the court's right to hear and determine questions arising upon administration.

In *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 628, it is held that an order of probate of a will, made in fraud of a party interested, may be set aside after the term. The court said:

"Upon proof of fraud or collusion in the procurement of a judgment, such judgment may be vacated at any time."

In *Adams v. Adams*, 21 Vt. 162, it is said that a probate court has the power, and it is its duty, upon proof of fraud, accident or mistake in the entry of an order, to set such order aside.

In *Worthington v. Gittings*, 56 Md. 542, the court, while affirming an order of the orphan's court denying an application to vacate the probate of a will, said:

"From what we have said, however, it must not be inferred that parties interested may not impeach the probate for fraud and collusion in obtaining it, and, upon making it clearly to appear that it was so obtained, to

have it revoked. The law so abhors fraud that it is tolerated in no form or character of judicial proceeding. 'Fraud is an extrinsic, collateral act,' says Lord Chief Justice De Grey, in delivering the opinion in the *Duchess of Kingston's* case, 2 Sm. L. Cas., (4th Am. Ed.,) 508, 'which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.' * * * And that revocation of the probate of a will may be obtained, upon showing fraud or collusion in procuring the probate, though it be taken in solemn form, is abundantly established by authority. 1 Wms. on Ex'rs, (3rd Am. Ed.,) 473. But in order to procure such revocation, it must be by direct application for that purpose, and the fraud or collusion, with all the particulars, must be distinctly charged."

It must, then, be regarded as settled that the county court, as a court of probate, may, on proper grounds, revoke the probate of a will. Except, therefore, for the statute in question, there would be no doubt of the petitioner's right to have her cause determined on the facts alleged. Does this section, as a statute of limitation, bar this suit?

"It is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions." 25 Cyc. 990.

Applying it according to the plain import of its terms it cannot be said to bar this suit. It applies "in all actions wherein the execution or contents of any last will may be brought in question." No question is here made that the will was not executed as required by the law, nor is it claimed that its contents render it invalid. The purpose of the statute is further indicated by the fact that by it an order of probate is made conclusive proof, not of all questions which may arise concerning the will, but only of its "execution," and "the legality and validity" of its contents, and that, only "*so far as the same were determined at the probate.*" Observe that it is not the validity of the will in all respects, which is thus established. The closing words, which make the probate binding upon

all persons, must be read in connection with this parenthetical clause, and be limited in scope by it. Unless it does thus limit the matters which may be conclusively established, it has no meaning at all, and the rules of construction require us to give it a meaning. The contents of a will include the terms used in it, and it cannot be said that the legality and validity of the contents are determined when there was no question raised as to them. By the express language of the section, they are established only when they have been *determined*, and determined in a judicial proceeding, means adjudicated on an issue presented. Manifestly the object of the law makers in enacting this statute was to prevent repeated litigation of the same issues. It indicates no purpose to abrogate established rules under which rights are protected. This view is sustained by section 7097, R. S. 1908, which provides that:

"If, upon the probate of a later will, or upon rehearing in the county court, or upon appeal or otherwise, it shall be judicially determined that any writing theretofore admitted to probate, is not the last will of decedent, the probate of such writing shall forthwith be revoked,
* * *"

We find nowhere in the statutes any statement as to what shall be sufficient grounds for a rehearing, nor any specification of the time within which a rehearing may be granted. Those questions must, therefore, be determined upon grounds recognized by the rules of law. This section may be regarded as a legislative construction of the section preceding it.

The one year period of limitation does not apply to those who were summoned and appeared. There is, therefore, no provision for a contest by such parties after probate, and upon the theory of counsel for defendants in error, the probate becomes conclusive, though obtained by fraud. In the absence of language clearly expressing such a purpose, we cannot so construe the law. To deny the right to make a direct attack upon a judgment ob-

tained by fraud would be shocking to every thinking person.

The complaint sets out in considerable detail the various acts of defendant Mitchell, which, it is charged, were intended to and did mislead the testator and induce him to make this will. We are of the opinion that the complaint states a cause of action.

For the reasons above stated the judgment is reversed, and the cause remanded for further proceedings in harmony with the view herein expressed.

MR. JUSTICE BURKE dissents.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE DENISON not participating.

No. 10,059.

See 21 Mich. R. 2. 708

BARNARD v. MOORE, ET AL.

Decided May 1, 1922. Rehearing denied June 5, 1922.

Action for interest in real estate. Judgment for defendants.

Reversed.

1. REAL PROPERTY—*Power to Transfer under Will.* A testator devised to his wife a life estate in land with remainder to his children, giving the wife power "to sell said place". Held, that this gave her power to sell the fee.
2. WORDS AND PHRASES—"Sell the place", means to sell the whole title.
3. WILLS—*Real Property—Quitclaim Decd.* A husband devised to his wife a life estate in land with power to sell. Held, that the power to convey created in her no right, title or interest

in the premises, and that a quitclaim deed granting all her right, title and interest, without reference to her authority to transfer the fee, conveyed her life estate and no more.

4. *SHELLEY'S CASE—Rule Discussed.* The rule in Shelley's case held to have no application to the cause under consideration.
5. *WILLS—Property—Title.* A testator devised to his widow a life estate in land, with power to sell, and remainder to his children "in fee simple", with the condition that if any child should die before the widow, his share should pass to his heirs. The widow quitclaimed her interest to the children, one of whom thereafter conveyed his interest and then died. A daughter of the deceased son made a claim to his interest. Held, that the interest was a fee simple subject to a conditional limitation, which terminated with the death of the son and let in the right of the daughter, who would take by virtue of the will and not by descent; that neither the deed of the widow nor that of the father passed her right, and that she had a vested interest in the land.
6. *LIFE ESTATE—Acceleration of Remainder.* Where a husband devised to his wife a life estate in land and remainder to his children, a conveyance of the life estate did not accelerate the remainder.
7. *PLEADING—Amendment.* Under sections 79 and 81, code of 1908, a party after demurrer sustained to his complaint, has a right to amend without leave.

Error to the District Court of Montrose County, Hon. Thomas J. Black, Judge.

Messrs. CATLIN & BLAKE, for plaintiff in error.

Mr. ADAIR J. HOTCHKISS, Mr. MILLARD FAIRLAMB, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

[MOORE, by the eighth clause of his will, devised land to his wife for life, remainder to his five sons and daughter "in fee simple" with a condition that if any son or daughter should die before the widow, then "the share of such child shall pass to the heirs of such child."]]

Said eighth clause contained the following:

"In the event my wife shall desire to sell said place during her lifetime, the proceeds of such sale shall be at once freed from her life estate hereinbefore devised, and shall be equally divided between my five sons and Ida V. Prickett" [the daughter] "and none other."

After the testator's death the widow executed a quit claim to the six remaindermen, in which she referred to the said eighth clause, but not expressly to the power; thereafter L. Wiley Moore, one of the sons, conveyed his one-sixth interest to his brother and co-tenant, James A. Moore, by a deed of bargain and sale without warranty. L. Wiley Moore then died. The widow is still living. Plaintiff in error was plaintiff below and is daughter and sole heir of L. Wiley Moore, and claims one-sixth of the said land by virtue of said will. A demurrer to her complaint was sustained. She asked to amend by alleging that the widow did not intend by the quitclaim deed to execute the power, but her request was denied, and judgment was rendered against her.

All agree that the will gave to the widow a life estate only.

The plaintiff in error claims: 1. That the power was to sell the life estate only; 2. That the power, if to sell the fee, was never exercised; 3. That the power, if to sell the fee, was to sell it only and distribute the proceeds to the remaindermen; not to convey to them; 4. That the sons and daughter by the terms of the will each took a determinable fee in remainder in one-sixth of the property, determinable on his or her death before the mother; 5. That by the will the heir of such son took $1/6$ by executory devise; 6. That, therefore, neither the deed of the widow nor that of her father could or did pass the interest of the plaintiff; and so upon his death before his mother, it passed to plaintiff.

Defendant in error on the other hand claims: 1. That the power was to sell the whole estate; 2. That that power was exercised; 3. That the conveyance to the

remaindermen was a substantial and proper exercise of the power; 4. That the sons and daughter, by the rule in Shelley's case, took a vested remainder in fee simple absolute; 5. That if the widow's deed conveyed but a life estate yet by acceleration the grantees took a fee; 6. That therefore, these remaindermen owned a fee simple absolute and plaintiff having no claim but by inheritance, is cut off by her father's deed to James A. Moore.

1. It will be convenient first to consider the above sentence granting a power. The defendant in error claims that it grants power to sell the fee, and to this we agree. The intention is clear. She may sell "the place" and the common understanding of these words is to sell the whole title. The proceeds are to be "freed from her life estate." It is not reasonable to suppose that the testator meant to say that the proceeds of a sale of the life estate were to be "freed" from the life estate. How could they be otherwise? *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780. Then, too, there was no occasion to grant power to sell the life estate.

2. A more difficult question is whether the widow, by her deed above mentioned, conveyed the fee or only her life estate. We think only her life estate. The deed, in the ordinary quit claim form, purports to convey not the land, but all her right, title and interest therein, if any. *Valle v. Clemens*, 18 Mo. 486, 489; *Gibson v. Chouteau's heirs*, 39 Mo. 536, 566; *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491; *Frink et al. v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 322, 13 L. Ed. 703. A power to convey creates, in the donee thereof, no right, title or interest in the premises to be conveyed. *Russell v. Russell*, 36 N. Y. 581, 21 R. C. L. 772-3, 93 Am. Dec. 540. Her only right, title or interest, then, was an estate for life; therefore she conveyed nothing more, unless, elsewhere in the deed, it appears that she intended to exercise the power.

After the description and before the habendum is the following:

"The intention being to grant, bargain, sell and convey to the parties of the second part all right, title and interest of the party of the first part in and to the above described premises by virtue of the last will and testament of Thomas M. Moore, deceased, more particularly the eighth paragraph thereof."

If this shows an intention to execute the power the fee passed.

A reference to the power is usually considered a sufficient indication of intent to use it, but it should be noticed that the grantor does not refer in plain terms to the power granted by the will but only to the eighth paragraph and to all her "right, title and interest * * * in and to the above described premises."

It seems that a deed containing no reference to the power will not be regarded as an exercise thereof, unless otherwise there would be nothing for the conveyance to operate on. *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324, 24 N. E. 177; *Towle v. Ewing*, 23 Wis. 336, 99 Am. Dec. 179; Sugden on Powers (3rd Am. Ed.) 477; 4 Kent Com. 371. See *Bradly v. Westcott*, 13 Ves. Jr. 445.

There are cases which go to the length of holding that a clause much like that above quoted is a reference to the power sufficient to indicate intent to exercise it, (*Goff v. Pensenhafer*, 190 Ill. 200, 60 N. E. 110); but we cannot so construe this clause. The grantor, on the contrary, indicates an intent not to use the power, because, carefully using apt words to convey her interest only, she as carefully refrains from mentioning either any other interest or the power. It is, to say the least, an unusual method of expression for her to say that she intends to grant, bargain, sell and convey her right, title and interest when she means to exercise a power to convey rights, titles and interests of others. The obvious and natural thing to do, if Mrs. Moore intended to exercise the power was to say so, and, to convey the fee, the least she could do was to make a deed, as Wiley did, not limited in terms to the interest she had. Our conclusion on this point is that

the widow conveyed her life estate and no more.

3. That conclusion makes it unnecessary to consider whether a conveyance to the remaindermen by virtue of the power would have been a proper exercise thereof.

[4. Did the sons and daughter, under the rule in Shelley's case, take a fee simple absolute? We think not. We shall assume, without deciding, that the rule in Shelley's case is in force in Colorado, i. e., If a freehold estate be limited to A, remainder to his heirs, he takes a fee simple and so can convey the whole estate free from claims by his heirs. Do the facts bring this case within that rule? No. It is the use of the word "heirs" that brings the rule in Shelley's case into action. The word may be used as a word of limitation, as in ordinary deeds, or as a word of purchase. 2 Und. on Law of Wills, §§ 602, 608; 40 Cyc. 1398.

If it is regarded as a word of limitation the heir takes by inheritance; if as a word of designation or *descriptio personæ*, he takes by purchase, i. e., by force of the will.

We are unable to reconcile the cases or to construct a workable rule from them. On the one hand it is said that the rule is one of property and not of construction. It follows that the intention of the testator is immaterial and many cases so hold. On the other hand it is said that if the context shows that the word heirs was used as a word of purchase, the rule does not take effect. "Used as a word of purchase" means used with that intent and means nothing else. It follows that the intention of the testator in the use of the word is material. How he used it depends on his intention. It follows then that his intention is conclusive. With the intent the case goes one way, without it the other. If his intention is conclusive (of course we refer to his intention as revealed by the will) the question is wholly one of construction, and the rule as a rule of property is abrogated.

The probable explanation of this conflict is that since the real reason for the rule has disappeared with the feudal system of tenures the courts seek ways to avoid

the injustice of attaching to a deed or will an effect contrary to its expressed intent. For that same reason we are not willing to ignore such cases as authority and revert to the unqualified doctrine that the word "heirs" with whatever intent used must import a fee simple. If by the word "heirs" the testator meant to indicate the persons who, upon the fulfillment of the condition, should take the land, it must be said that they take by purchase, that is by force of the will, not by inheritance. 1 Tiffany Real Property, (2nd Ed.) § 152, because then it was used not in the technical sense of heirs in succession forever, but as a description of the persons to whom the interest should pass. Kales Fut. Int., § 422.

A fee simple having already been given to Wylie in terms, there could be no occasion or possibility for the operation of the rule if no further provision were made. The rule comes into operation, then, by virtue of the express condition of Wylie's death before his mother. The question then is, In what sense did the testator use the word "heirs" in connection with that condition? If in the technical sense it was a superfluity since Wylie's interest upon his death would descend to his heirs anyhow, and so the fulfillment of the condition would produce no effect; but if as a *descriptio personæ* the condition becomes intelligible. We see a purpose in it.

The intention of the testator, it seems to us, was to direct by his will that the heir should take and that the children's estate was not absolute. He did not give his children an estate for life with remainder to heirs. He gave each of them a remainder in fee simple which should be absolute if the child survived the mother, but if not, "the share of such child" should "pass to the heirs of such child." It is a definite expression of a determinable estate. On the expressed condition that the son dies before his mother this remainder goes to his heir. It must be by force of the will, else why say it? The testator's idea is that at the death of his widow the land will go from her to his son; it will then be his, not before. But what if he

dies first? "I wish it to go to his heirs and I will so provide." His idea is that he is controlling the matter and that the land goes *from the widow* at her death. He was substituting the heirs for the remainderman, and so limiting their interest upon the life estate of the widow and not upon that of the remainderman. The rule in Shelley's case can have no application.

The interest acquired by Wylie would seem to be of the class called by Prof. Kales "a fee simple subject to a conditional limitation" distinguished from a determinable fee. (§ 301, quoting Professor Gray) in that the condition upon which it determined was in the nature of a condition subsequent and not a limitation on the original estate. See *Burlington & Colo. R. Co. v. Colo. E. R. R. Co.*, 38 Colo. 95, 100, 88 Pac. 154. Mr. Tiffany seems to be of the same opinion. 1 Tiffany R. P. (2nd Ed.) § 163. It is not important which it was, however, because in either case it terminated with the death of Wylie and let in the plaintiff's right. 7

Such interests are familiar in this state (*Cowell v. Colorado Springs Co.*, 3 Colo. 82, affirmed 100 U. S. 55, 25 L. Ed. 547; *Brown v. State*, 5 Colo. 496; *Burlington & Colo. R. R. Co. v. Colo. E. R. R. Co.*, *supra*; *El Paso County v. Colo. Springs*, 66 Colo. 111, 180 Pac. 301) and are frequently called determinable fees. Kales § 301.

The plaintiff's interest is of the class called by Mr. Kales "shifting future interests" because it defeats prematurely a preceding interest expressly created. Kales Fut. Int., §§ 26 and 442. Such an interest when created by will is called an executory devise and is valid. *Ib.* §§ 442, 467 and 472. 1 Tiff. R. P. (2nd Ed.) § 157. It is regarded as a new estate created by the fulfillment of the condition which defeats the previous estate.

5. Did the conveyance of the life estate by the widow to the children make their title a fee simple absolute under the doctrine of acceleration? We think not.

If we are right in our conclusions that the plaintiff takes by virtue of the will and not by descent, no accel-

eration can cut her off. It has been held, moreover, that a conveyance of the life estate will not accelerate the remainder. *Keir v. Keir*, 155 Cal. 96, 99 Pac. 487; *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264.

6. It follows that neither of the deeds before us passed plaintiff's right and that she now has a vested interest in the land.

7. The defendant in error insists that the interest claimed by the plaintiff is a remainder limited upon a fee and therefore void. It is elementary that a remainder may not be limited on a fee simple, but an executory devise may. *Siegwald v. Siegwald*, 37 Ill. 430; Bouv. L. D. Tit. Ex. Dev.; 2 Alex. on Wills, 1472-3. If however, we are right in what we have said above, plaintiff's estate is not limited on her father's remainder but is a new estate created by the fulfilled condition.

8. Something is said about the repugnance of the plaintiff's interest to the remainder in fee devised to her father. There is no repugnancy, and there is no objection since the statute of uses. 1 Tiffany R. P. §§ 157, 167, p. 574.

9. The power to convey the fee did not have the effect of giving the fee to the life tenant. 1 Tiff. R. P. 80; *Mulberry v. Mulberry*, 50 Ill. 67.

10. The plaintiff asked to amend her complaint by alleging that the widow did not intend, by her deed, to convey more than her life estate. We are of the opinion that under the Code, §§ 79 and 81, the plaintiff, after demurrer sustained, had a right to amend without leave, but we do not now see that such an amendment as she asked leave to make would have enabled her to prove anything that she might not prove under the pleadings as they stand.

Reversed and remanded.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,094.

THE SIGEL-CAMPION LIVE STOCK COMMISSION CO. v.
ARDOHAIN, ET AL.

Decided May 1, 1922. Rehearing denied June 5, 1922.

Action to recover for sheep alleged to have been sold plaintiff in error. Judgment for plaintiff.

Reversed.

1. PRINCIPAL AND AGENT—*Implied—Estoppel*. An implied agency is real but not apparent; agency by estoppel is apparent but not real.
2. *Agency, How Established*. One dealing with an agent must show actual authority, or apparent authority, relying upon appearances and the doctrine of estoppel.

A principal may bind himself by causing others to believe the agent's authority to be greater than actually exists, but such acts of the principal must be known to and proved by the party relying thereon.
3. ESTOPPEL—*Pleading*. One relying upon estoppel must plead it.
4. PRINCIPAL AND AGENT—*Evidence*. Facts reviewed and held not to establish agency.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. L. F. TWITCHELL, for plaintiff in error.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOL, Mr. GEORGE OLIVER MARRS, for defendants in error.

Department Three.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT in error Ardohain brought suit against plaintiff in error (hereinafter referred to as "the company") and defendant in error Emerson, for \$7764 and interest as the purchase price of certain sheep alleged to have been sold by Ardohain and shipped from California and which, upon arrival in Denver, it was said the company wrongfully refused to receive or pay for. By replication Ardohain admitted that these sheep were later sold in Omaha for \$5126.35, hence reduced his demand for \$2637.65 and interest, a total of \$2987.65, for which amount an instructed verdict was returned. To review the judgment thereupon entered the company prosecutes this writ. Just how the company gets rid of Emerson as a codefendant and shifts him to the other side of the cause in this court is not clear, neither is it material. A default having been entered against him below he appeared at the trial as the principal witness for Ardohain who gave no evidence in person or by deposition.

That Ardohain intended to charge both the company and Emerson with participation in the purchase is certain, but in what capacity is doubtful. The language of the complaint is:

"During all of the times hereinafter mentioned and for many years prior thereto, the defendants have been jointly engaged in the business of buying and selling cattle and sheep for and on account of the defendant, The Sigel-Campion Live Stock Commission Company; the details of said joint agreement are unknown to plaintiff, but plaintiff alleges that the defendant Emerson is and during the past twelve years was purchasing agent, 'scalper' and buyer for the defendant, The Sigel-Campion Live Stock Commission Company.

That on, to-wit, the 17th day of June, 1919, at or near the city of Fresno, California, Plaintiff sold and delivered to the defendants at their special instance and request, 866 head of yearling wethers at and for the agreed price of \$9 per head, or the total sum of \$7764, which sum was due and payable on delivery. Thereupon the plaintiff de-

livered to the defendants said 866 head of sheep and the same were shipped to defendant The Sigel-Campion Live Stock Commission Company at Denver, Colorado."

The company admitted its refusal to receive and pay for the sheep, alleged that Emerson's purchase was not only without its knowledge and consent, which fact it avers was known to Ardohain, but that such purchase was likewise contrary to its direction, and that the consignment by Emerson and the drawing of a draft on the company in payment for the sheep were also without authority.

To minutely review the evidence in this transaction would serve no good purpose. It establishes beyond question that Emerson's purchase of the Ardohain sheep was without authority of the company and contrary to its direction. The judgment if upheld must therefore rest upon an implied agency arising from a course of dealing and this is the theory of counsel for Ardohain. The learned trial Judge thus correctly stated the issue: "The only question now is as to whether or not there is an authority derived from a course of dealing." He thereupon holds that such authority existed. His error arises from a failure to distinguish between implied agency in its true sense and agency by estoppel. The confusion is common in the authorities and seems due to the fact that in many cases the distinction is immaterial.

An implied agency is real but not apparent. It is created by act of the parties and is deduced from proof of other facts. The principal, having voluntarily assumed its obligations, cannot complain that he is bound thereby. Hence it is immaterial that one who seeks its protection did not know of its existence at the time of the transaction. Irrespective of a prior course of dealing which might otherwise tend, in the instant case, to establish such an agency the undisputed evidence before us shows that Emerson's sole authority was to investigate and report. He could then buy only upon specific approval by the company of the particular purchase proposed. This then is not a case of implied agency.

An agency by estoppel is apparent but not real. It is created by operation of law and established by proof of such acts of the principal as reasonably lead to the conclusion of its existence. Created for the protection of him who in good faith has relied upon it the acts of the principal which support it must, at the time of the transaction, have been known to him. 2 C. J. 444 sec. 42.

One dealing with an agent may show actual authority though this was not known to him when he dealt, or he may show apparent authority and that he has relied upon appearances, and support this under the doctrine of estoppel. *Columbia Mill Co. v. National Bank*, 52 Minn. 224, 228, 229, 53 N. W. 1061.

A principal may bind himself by causing others to believe the agent's authority to be greater than actually exists, but such acts of the principal must be known to and proved by the party relying thereon. He cannot claim reliance upon what he did not know. *Merchants' Bank v. Nichols & Shephard Co.*, 223 Ill. 41, 50, 79 N. E. 38, 7 L. R. A. (N. S.) 752.

In this respect the evidence does not support the judgment. Assuming, but not deciding, that the course of dealing relied upon was established, no knowledge thereof was brought home to Ardohain and there is a total absence in the record of any evidence to show that he dealt with Emerson as the agent of the company. Moreover, such an agency rests upon estoppel which must be pleaded and there is no such plea.

Again, we are confronted by a still more serious defect in the case made by plaintiff below. The evidence shows that Emerson and the company were in correspondence by letter and telegram. Emerson's letters show that he told Ardohain he was wiring the company certain prices on these sheep. The fact is undisputed. It thus appears Ardohain had full notice that Emerson could not purchase for the company without express acceptance as to price. The evidence shows no such acceptance. These facts being known to Ardohain no reliance by him upon an agency

implied from a course of dealing could be upheld. The least that can be said on this phase of the case is that Ardohain was thus put upon inquiry as to Emerson's real authority and was bound to ascertain the extent of his agency.

The judgment is reversed and the cause remanded with directions to enter judgment for the company.

MR. JUSTICE TELLER sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY concur.

No. 10,282.

ROBERTS, ADMINISTRATRIX v. STRONG.

Decided May 1, 1922. Rehearing denied June 5, 1922.

On motion to dismiss writ of error.

Motion Sustained.

1. JUDGMENTS—*Final—Review.* An order of the county court: "That petitioner be allowed to withdraw her claim as prayed in the petition", is not a final judgment and not subject to review on writ of error.

Error to the County Court of Weld County, Hon. Frederic W. Clarke, Judge.

Mr. JOHN T. JACOBS, Mr. ARTHUR E. HEALEY, for plaintiff in error.

Messrs. MELVILLE & MELVILLE, Mr. HUBERT L. SHATTUCK, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT in error filed her claim against the estate

of W. C. Roberts, deceased. The claim was allowed as a claim of the fifth class. Thereafter she filed her petition praying:

"That the order heretofore entered allowing said claim be set aside, that your petitioner be allowed to withdraw said claim so filed in this court against said estate, and be allowed to go hence and seek her equitable relief in a court of competent jurisdiction."

After answer and replication a hearing was had and testimony taken, whereupon the court ordered: "That the petitioner be allowed to withdraw her claim as prayed in petition."

To review that order the administratrix sues out this writ and the cause is now before us on motion to dismiss because the foregoing order was not a final judgment.

Following the rule announced in *Stevens v. Solid Muldoon Printing Co.*, 7 Colo. 86, 1 Pac. 904, the motion must be sustained. The order which the administratrix seeks to have reviewed is a mere permission to withdraw a claim. The order allowing the claim does not appear to have been set aside, nor the claim yet withdrawn so far as this record discloses. This in no respect comes within the definition of a final judgment as given in *Goodknight v. Harper*, 70 Colo. 41, 197 Pac. 237, and other decisions of this court. The writ is accordingly dismissed.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,298.

WHITESCARVER v. INTERSTATE TRUST COMPANY, ET AL.

Decided May 1, 1922. Rehearing denied June 5, 1922.

Action to cancel an alleged fraudulent deed. Judgment for plaintiffs.

Affirmed.

On Application for Supersedeas.

1. EVIDENCE—*Estoppel*. Evidence competent and relevant under the issues was properly admitted, and the fact that it might also have been admissible upon the theory of estoppel which was not pleaded, is immaterial.
2. APPEAL AND ERROR—*Fact Findings*. Findings of the trial court on conflicting evidence will not be disturbed on review.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Mr. JOHN T. BOTTOM, for plaintiff in error.

Messrs. DINES, DINES & HOLME, Mr. ROBERT E. MORE, Mr. PAUL P. PROSSER, Messrs. SYMES & WINGREN, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE Interstate Trust Company and others were plaintiffs below and had a decree cancelling a certain deed from Charles A. Whitescarver to his wife, Rosa B. Whitescarver, as fraudulent. She brings error and moves for supersedeas.

The matters relied on for reversal amount to two: 1. That evidence of estoppel was received although estoppel was not pleaded; and 2. That the evidence does not support the decree.

1. Upon the first point: The evidence was of representations made by the husband, for the purpose of obtaining credit, that he was the owner of the property conveyed. This was competent and relevant to the allegation of the complaint that he and his wife, plaintiff in error, had conspired to defraud, of which there was some evidence; his statements in pursuance of the conspiracy were competent against her, therefore, regardless of the question of estoppel.

2. As to the second point the evidence was conflicting. Supersedeas denied, and judgment affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 9941.

DARROW, CONSERVATOR v. ROHRER, ET AL.

Decided June 5, 1922.

Petition by conservator for leave to compromise a claim.
Petition denied.

Reversed.

1. WORDS AND PHRASES—"Desperate"—"Hope". "Desperate" means without hope. "Hope" denotes some degree of expectation.
2. INSANE—Estate—Compromise of Desperate Claim. Facts reviewed and held, that the county court should exercise its discretion in passing upon a petition to compromise an alleged desperate claim owing the estate of an insane person.

Error to the County Court of the City and County of Denver, Hon. Ira C. Rothgerber, Judge.

MR. C. W. DARROW, Messrs. DANA, BLOUNT & SILVERSTEIN, for plaintiff in error.

Mr. BARNWELL S. STUART, Mr. JOHN J. MORRISSEY, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

DARROW, plaintiff in error, is conservator of the estate of the defendant in error, Elizabeth M. Rohrer, appointed by the county court of Denver. He brought a suit against one Mrs. Wagenblast, to set aside a deed from his ward to her, on the ground that it was the deed of a lunatic.

Pending that suit he applied to the county court and obtained leave to compromise the suit by the payment to him of \$2500 and the conveyance of a small house worth \$600. The payment was made and the conveyance executed and they are still held by the conservator. That order of the county court was brought here on error, and we reversed it on the ground that the claim was not shown to be desperate, (R. S. § 7161) and that the purpose of the compromise, which was stated to be to enable the estate of the lunatic's deceased husband to more readily defend against certain unjust claims through Mrs. Wagenblast's evidence, was an illegal purpose. We declined to determine whether Mrs. Rohrer was actually insane or whether, she having been adjudged insane, her insanity could be questioned in the case in the district court; but we directed that that case be tried on its merits. *Rohrer v. Darrow*, 66 Colo. 463, 182 Pac. 13.

The case was tried on its merits. The district court took up the question of Mrs. Rohrer's sanity; found that she was sane at the time of the delivery of the deed, and that the deed was in effect a release of a mortgage and was valid, and rendered a decree in favor of Wagenblast. Thereupon the conservator again applied to the county court for leave to compromise as before. The judge of that court stated that he considered it for the best interests of the estate to make the compromise, but that he regarded his court as controlled by the opinion of this court and therefore he directed the conservator to bring the

district court case here and also to sue out a writ of error upon his own judgment denying the petition for leave to compromise. The case now before us is on error to the county court upon said denial; the district court case is also here and is determined with this.

The county court was not concluded by our former decision from granting the second petition to compromise. Neither of the reasons for our decision necessarily existed when that petition was presented. The decision of the district court had put the claim against Wagenblast in a different position and we cannot say that the county court might not justly regard it as desperate. Desperate, means without hope. Hope, denotes some degree of expectation. If there was no expectation whatever, the case would be desperate even though success might still be regarded as possible; and if the settlement appeared to be for the benefit of the estate without regard to the question of Mrs. Wagenblast's testimony then it would be proper to grant the relief.

Our conclusion is that the county court should have exercised its discretion and should have directed the conservator to consummate the compromise, if, as it seems was the fact, it regarded that as desirable and proper.

We are affirming the judgment of the district court on its finding that the transaction between Wagenblast and Rohrer was a mortgage and had been fully paid. We assume that the said payment of \$2500 by way of compromise was regarded by the district court as fully discharging the claims of Mrs. Rohrer as heir of her husband under the contract shown in that case. If so, from the facts now before us, we can see no reason why the compromise should not be consummated.

The judgment is reversed with directions to the court to consider, upon such facts as may be brought before it, whether the compromise is desirable and proper and exercise its judgment.

MR. JUSTICE TELLER sitting as chief justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating,

No. 9947.

JONES v. JONES, ET AL.

Decided June 5, 1922.

Action for divorce. Decree for plaintiff.

Affirmed.

1. **DIVORCE AND ALIMONY—Decree.** In an action for divorce where the verdict was for plaintiff on all the issues, and the court in its findings adopted and approved the findings and verdict of the jury with an express finding of desertion as alleged in the complaint, the findings were sufficient to support a decree for plaintiff, although silent as to the issues raised by the cross complaint.
2. **Decree—Jurisdictional Facts.** The jurisdictional facts being admitted by the pleadings, a decree for divorce is not void for failing to recite them.
3. **APPEAL AND ERROR—Motion to Set Aside Findings.** In an action for divorce, plaintiff in error having made no motion to set aside the findings of fact by the court, is in no position to complain of alleged defects therein on review.
4. **Abstract—Record.** Where there is a discrepancy between the abstract and original record, the latter imports absolute verity and will control.
5. **DIVORCE AND ALIMONY—Condoned Adultery.** Condoned adultery is not a bar to a divorce, because it is not a ground for divorce.
6. **APPEAL AND ERROR—Bill of Exceptions.** A record, although designated a "bill of exceptions", is not such where it has not been settled and signed by any judge.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. JOHN M. GLOVER, for plaintiff in error.

Mr. GEORGE A. CHASE, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action for divorce. The complaint charges desertion. The defendant filed a cross-complaint charging cruelty, adultery, and nonsupport. A trial to a jury resulted in verdicts for plaintiff on all of the issues. Thereafter, and at the proper time, judgment was entered for plaintiff. Defendant brings the cause here for review.

The plaintiff in error contends that the decree is void, and should be reversed, because the findings of the court are silent as to the issues raised by the cross-complaint. The court in making its findings of fact, pursuant to the statute, alleges that it "adopts and approves the findings and verdict of the jury," and then expressly makes a finding upon the issue of desertion. The findings are sufficient to support the decree.

Other contentions are, in effect, that the decree is void for failing to recite jurisdictional facts relating to the marriage and the residence of the parties. The jurisdictional facts are admitted in the pleadings, and the decree is not void for failing to recite them. 19 C. J. 160; 23 Cyc. 848.

The record shows no motion to set aside the findings of fact, at any time, and plaintiff in error is in no position to complain of any alleged defects in the findings. The decree is consistent with the findings as they are.

A contention is also predicated on the assertion that the court's findings were filed after forty-eight hours had elapsed since the return of the verdict, which is true according to the printed abstract prepared by plaintiff in error, but it is not true according to the original record. The latter imports absolute verity.

The plaintiff in error complains of an instruction relating to the condonation of adultery. It is claimed that the instruction is wrong in assuming that a party may obtain a divorce even if it appear that he himself has been guilty of adultery, provided the adultery was condoned. Such assumption, however, would be correct. *Condoned*

adultery is not a bar to a divorce, because it is not a ground for divorce. Section 6 of the divorce act of 1917 (Ch. 65 S. L. 1917) provides that "if upon the trial * * * both parties shall be found guilty of any one or more of the causes for divorce, then a divorce shall not be granted to either of said parties." In the instant case only one party was found guilty of any cause for divorce. The argument of plaintiff in error appears to be aided by a quotation from *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811, but that case is no longer authority on the point herein mentioned, since it was decided under the divorce act appearing in the General Laws of 1877, which denied a divorce if it should appear that both parties have been guilty of adultery.

What is designated as a bill of exceptions in this case is not a bill of exceptions, and has not been settled and signed by any judge. There is no reversible error in the record. The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,011.

ROHRER v. WAGENBLAST, ET AL.

Decided June 5, 1922.

Action to set aside deed. Judgment for defendant.

Affirmed.

1. APPEAL AND ERROR—*Deed—Validity—Harmless Error.* In an action to set aside a deed executed by one alleged to have been insane, the deed being in fact a release of a mortgage, the in-

debtedness secured by which had been fully paid, it was immaterial whether it was error to try the question of the sanity of the grantor, or whether the deed was valid, as title to the property must be held to be in the grantee.

2. *Fact Findings.* Findings of the trial court supported by competent evidence will not be disturbed on review.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Mr. BARNWELL S. STUART, Mr. JOHN J. MORRISSEY, for plaintiff in error.

Messrs. SABIN & MCGLASHAN, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

ELIZABETH M. ROHRER brings error upon a decree of the district court of Denver declaring valid a deed from her to the defendant in error, Wagenblast. See *Rohrer v. Darrow*, 66 Colo. 463, 182 Pac. 13, and *Darrow v. Rohrer*, 207 Pac. 861, decided at the present term.

The essential facts are as follows: Darrow, as conservator for the present plaintiff in error, brought a suit in the district court to set aside a deed from his ward to Mrs. Wagenblast, on the ground that the grantor, at the time of the execution of the deed, was an adjudged lunatic. The decree found that though adjudged a lunatic, she, at the time of the execution of the deed, was not such; that the title to the property described in the deed had been in her to secure an indebtedness which had been fully paid and that she had no further interest therein. The effect of this decree was of course that she was a mortgagee and that the deed in question was a release, and, since Rohrer was a mortgagee and the debt was paid, Mrs. Wagenblast was entitled to a release whether Mrs. Rohrer was sane or insane. If there had been no deed, with these facts before the court, it could not have refused a decree for a release. It is immaterial, therefore, whether it was error to try the question of the sanity of the adjudged

lunatic or whether the evidence was sufficient to show Mrs. Rohrer to be sane, or whether the deed was valid. Even if all these things were erroneously determined there is no prejudice because in any event the title to the property must be held to be in Mrs. Wagenblast.

It is urged that the proof that the transaction was a mortgage must be beyond a reasonable doubt and that no such proof is shown; but it does not appear from the record that the judge below, where the witnesses all appeared, might not justly have been convinced beyond a reasonable doubt, and so we cannot say he was wrong; and, so far as payment is concerned, the defendant in error has paid, including the \$2500 mentioned in *Rohrer v. Darrow, supra*, enough to justify the court in finding that she has fully discharged all liability secured by the contract between her and Rohrer which is shown in the record.

We find nothing incompetent in the testimony of the witnesses Howard and Parsons. It is not necessary to discuss these matters because they depend on elementary principles.

Judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,036.

INDUSTRIAL COMMISSION, ET AL. v. PUEBLO AUTO COMPANY,
ET AL.

Decided June 5, 1922.

Proceeding under the workmen's compensation act.
Claim for compensation denied.

Reversed.

On Petition for Rehearing.

1. **WORKMEN'S COMPENSATION**—*Accident Arising out of and in the Course of Employment.* An auto salesman, driving a machine belonging to his employer and returning to town after making a sale, was attacked and killed by persons whose purpose was to obtain the automobile in which he was riding. Held, that the industrial commission was justified in awarding compensation to his dependent widow, his death having been occasioned by an accident arising out of, and in the course of his employment.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Messrs. DEVINE, PRESTON & STORER, for plaintiffs in error.

Mr. FRED W. VARNEY, Mr. CHARLES W. O'DONNELL, for defendants in error.

Mr. CHARLES B. HUGHES, Mr. L. E. LANGDON, Mr. JOHN T. BARBRICK, *Amici Curiae*.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THIS case is before us on error to a judgment of the district court vacating the findings and award of the Industrial Commission. The award was in favor of the claimant, Annetta M. Parks, the widow, and one of the dependents of Elton C. Parks, deceased.

On April 11, 1919, Parks was in the employ of The Pueblo Auto Company as a salesman. On said day Parks went in an automobile into the country for the purpose of selling an automobile. On the trip he effected a sale to one Hunter, who started in the car with Parks on his return to Pueblo.

On the road they invited two brothers named Bosco, to ride with them. A little later, while on the road, one of the Boscoss shot and killed Parks. It appears that the killing was for the purpose of obtaining the automobile in which the parties were riding.

It is conceded that Parks was killed while in the course of his employment, but the district court held that the killing did not arise out of his employment. The correctness of that decision is to be determined on this review. We have been favored with exhaustive arguments upon this point. The cases seem to hold that the test is whether or not there is a causal connection between the injury and the employment, that is, are they so connected that the injury naturally resulted from the employment.

The arguments of counsel on both sides turn upon the question whether the assault upon Parks was a hazard special to his employment. Many cases are cited in which injury suffered from robbery of bank messengers and paymasters has been held to be compensable under these compensation acts. While it has been stated that these laws cover only dangers which might have been anticipated, yet the cases generally hold that if, after the injury, it can be seen that the injury was incurred because of the employment, it need not be such as to have been anticipated. We think that is the better rule.

The award of the commission can be sustained only on the ground that Parks lost his life while he was in the course of his employment and as the result of an attempt upon the part of the Boscoss to obtain possession of the employer's automobile.

The danger of assault upon a highway for the purpose of robbery is generally recognized, and said danger is more imminent in recent years since the possession of an automobile affords ready means of escape.

This court has held that an accident suffered by an employe while riding in an automobile to reach the place of his employment is compensable, and the only question is whether or not the danger of assault for the purpose

of robbery is as generally recognized as is the danger from collision, or other accidental injuries to automobiles and their occupants. If not as evident, is the danger so evident as to make it fairly a risk of traveling on the highway?

That such travel is subject to the danger of assault for the purpose of robbery is not to be denied in view of the frequent reports of such assaults.

Many of the cases cited are extremely liberal in applying these compensation laws to injuries of this general class. Some of them have gone so far as practically to eliminate the question whether or not the injury grew out of the employment, making it sufficient that it was suffered in the course of the employment. We do not feel at liberty to go that far and practically to amend the law, and we are not required to do so in this case. There is ample authority for holding that an injury inflicted in an attempt to rob an employe, while in the course of his employment, is compensable as arising out of such employment.

The case of *Mechanics Furniture Co. v. Industrial Board*, 281 Ill. 530, 117 N. E. 986, involved a claim for the death of a watchman who was killed on his employer's property. There was no evidence as to the purpose of the killing. The Industrial Board found from the circumstances of the case that the man had been killed in defense of his employer's property, and as a result of an attempt to rob.

The court held that the inferences drawn by the board were justified, and that the killing was in the course of and grew out of the deceased's employment.

In *Spang v. Broadway Brewing & Malting Co.*, 182 App. Div. 443, 169 N. Y. Supp. 574, it is held that an employe of a brewing company, who was killed while on a collecting trip, the killing resulting from an attempt to rob, was killed in the course of his employment, and that the killing grew out of his employment. The court said:

"The fact that the death of Spang was intentionally

caused does not defeat the claim. He was killed as an incident of his employment, because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and wilfully by a third party may be an 'accidental injury,' within the meaning of the act, from the viewpoint of the employer and the employee." (Citing a number of cases.)

That case would seem to be in point here.

It being established that Parks was killed in order that his assailant might obtain his employer's automobile in which Parks was riding on his master's business, we are of the opinion that the commission was justified in awarding compensation to the claimant. The judgment is accordingly reversed with directions to enter judgment affirming the award made by the commission.

MR. JUSTICE DENISON and MR. JUSTICE BURKE dissent.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,079.

HOEHNE DITCH CO., ET AL. v. MARTINEZ, ET AL.

Decided June 5, 1922.

Action to change the point of diversion of decreed water.
Change decreed.

Reversed.

1. WATER RIGHTS—*Change of Point of Diversion—Evidence.* In an action for a change of the point of diversion, evidence of the limited time of use of the water, acreage irrigated, and location

of the irrigated lands with reference to the stream, held competent.

2. *Decree—Evidence.* While an adjudication decree may not be modified after the time fixed by statute for questioning it, yet into every decree must be read a provision that it does not authorize waste or excessive use; and while the issue of abandonment may not be tried in a proceeding to change the point of diversion, the question of the use or non-use of the water sought to be transferred, may be considered.
3. *Findings Not Supported by Evidence.* Evidence in a proceeding for change of the point of diversion of decreed water reviewed and held not to support the finding of the court that the proposed change would not injuriously affect the vested rights of other appropriators on the stream.
4. *Change of Point of Diversion—Burden of Proof.* In an action for the change of point of diversion, the burden of proving that no injury to other appropriators would follow the proposed change, is upon petitioner.

Error to the District Court of Las Animas County, Hon. A. F. Hollenbeck, Judge.

Messrs. NORTHCUTT, FREEMAN and NORTHCUTT, for plaintiffs in error.

Mr. A. W. MCHENDRIE, Mr. B. H. SHATTUCK, for defendants in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

THE defendants in error began a statutory proceeding to change the point of diversion of 1.8 cubic feet of water per second of time from the Antonio Lopez Ditch, having Priority No. 2 from the Las Animas River, to the headgate of the Baca Ditch, a point seven miles down the river.

Plaintiffs in error, owners of and users of water from the Hoehne Ditch, the headgate of which is three miles down the river from the Baca Ditch, protested the change. The court found that the change would not be injurious to the vested rights of the protestants, and entered judgment allowing the change to be made. Error is alleged in

the rejection of evidence as to the amount of water used from the Lopez Ditch, and the time of such use. It is also urged that the findings are not supported by the evidence.

Plaintiffs in error offered evidence to prove that water was used from the Lopez Ditch only two hours a day, and that from the date of the decree to the day of trial, the petitioners and their grantors have never irrigated more than seventeen acres of land, and have never applied water to more than three acres of alfalfa. They offered also to show that all of the lands owned by petitioners are located in the river bed, and that only three acres of it can be irrigated. The court sustained objections to all these offers. The objection was founded, as stated by the objecting counsel, upon the proposition that the question of abandonment and nonuse, either before or subsequent to the decree, could not be considered.

This objection overlooks a distinction several times made by this court. We have held that while a decree may not be modified after the time fixed in the statute for questioning it, yet into every decree must be read a provision that only so much water is to be used as is necessary; that a decree for an excessive amount does not authorize waste or excessive use. It is also well settled that while an issue on abandonment may not be tried in a case like this, the question of the use or the nonuse of decreed water, a part of which appropriation is sought to be changed, may be considered.

Manifestly, if a portion of a decreed priority is not used, or is used excessively so that there is an appreciable return of water to the stream, and it is sought to take a portion of the decreed water out at a lower point interrupting the flow of the return waters which may be used to satisfy junior priorities, the amount of such return waters becomes very important. The court erred in sustaining these objections, as the protestants had the right to show the matters offered to be proved, as bearing upon the question above stated.

The court's findings relate wholly to seepage or return waters, and entirely ignore the matter of waters left in the river because of the fact that the consumers under the Lopez Ditch used water to only a small extent of the decreed appropriation. Manifestly, if they used water but two or three hours a day, and upon a small acreage, the greater part of the eight cubic feet belonging to that appropriation was left in the river. It can hardly be said that they were using the identical 1.8 cubic feet now sought to be diverted.

The court's findings are, of course, consistent with his rulings on the evidence. He having excluded the testimony as to what portion of the decreed appropriation was used, there was no reason to consider the effect of taking from the river through the Baca Ditch this excess water which has heretofore passed the Baca Ditch headgate, and been available at the headgate of the Hoehne Ditch.

The evidence in behalf of the petitioners was only the testimony of an engineer, who testified as an expert, and gave it as his opinion that the change would not affect the protestants' rights. On the other hand, the protestants, by testimony, showed a considerable seepage from the land irrigated from the Lopez Ditch, and further that the amount diverted to the Baca Ditch would be diverted at all times, twenty-four hours a day. In a question of this kind it is proper and material to show the use of the water proposed to be changed as originally diverted, and its use at the new point of diversion. The testimony is undisputed that a part of Priority No. 2 is and always has been used on sandy soil with a gravelly subsoil which naturally drains to the river.

Witnesses testified to having seen seepage from this water entering the river; and that the protestant ditch company did not at all times get the amount of water decreed to it and needed. The case is, in its general features, very like that of the *Baca Ditch Co. v. Coulson*, 70 Colo. 192, 198 Pac. 272, recently decided by this court. The testimony that there is seepage from these lands is

not disputed, and regardless of the excluded evidence, the findings of the court that the change would not injuriously affect the protestants is not supported by the evidence. The petitioners had the burden of proving that there would be no injury, and that burden has not been sustained.

The judgment is reversed and the cause remanded with directions for further proceedings in accordance with the views herein expressed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,084.

BERSHENYI v. THE PEOPLE.

Decided June 5, 1922.

Plaintiff in error was convicted of murder in the first degree.

Reversed.

1. *CRIMINAL LAW—Evidence—Uncommunicated Threats.* In a homicide case, evidence of statements of the deceased, made within a very recent time before the killing, and tending to show an attitude of hostility towards defendant, is competent. The fact that such statements were in the nature of threats which were uncommunicated to the defendant did not make them inadmissible.
2. *Intent of Defendant—Evidence.* In a homicide case, the exclusion of defendant's testimony as to his intent in striking deceased, is prejudicial error.
3. *Instructions—Erroneous.* In a homicide case where defendant attempted to justify his act under the doctrine of self defense, it was error to instruct the jury, "that no provocation will justify a person in killing another, nor will it excuse him", the effect being to withdraw his defense from the jury.
4. *Instructions—Inconsistent.* Where inconsistent statements of law are made in instructions, it is impossible to tell which the jury followed, and in as much as it might have followed the wrong one, such instructions constitute prejudicial error.

5. *Evidence—Rebuttal.* The admission of improper evidence on rebuttal which was likely to prejudice the jury against the defendant, held error.

Error to the District Court of Garfield County, Hon. John T. Shumate, Judge.

Mr. C. W. DARROW, Messrs. NOONAN & NOONAN, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES H. SHERRICK, assistant, for the people.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was convicted of murder in the first degree, and brings error. He will hereinafter be mentioned as defendant.

He was convicted of killing one Page in an altercation in the streets of Glenwood Springs where defendant was delivering milk. Page had recently been in his employ, and on the day in question went into the street, where defendant stood by the side of his truck, and demanded a small balance of wages. The only witness testifying as to what was said was the defendant himself. Other witnesses testified to the fact that there was something of an altercation, and that the defendant struck Page with a club taken from his truck, from which assault Page died some weeks later. Defendant claims that he acted in self-defense, testifying that during the conversation, in which Page recited a series of grievances against the defendant, Page had in his hand an open knife; that finally he lunged at defendant with the knife, and that the fatal blow was struck as a result of that attempt by Page to cut defendant.

There was testimony by a witness, who assisted in stopping the fight, to the effect that defendant at the time exclaimed that Page had tried to cut him.

One of the errors assigned is that the court excluded the offered testimony of three witnesses to the effect that

Page, between February 1st and February 8th, the date of the assault, had expressed great hostility to the defendant, and had stated that he would be justified in killing him if he wanted to. This testimony was excluded upon the theory that it was offered as a threat, and the fact that it had not been communicated to defendant was made the ground of its exclusion. Counsel for defendant explained in making the offers that the purpose of the testimony was to show a state of mind in Page, which would tend to corroborate the testimony of the defendant that Page had assaulted him with a knife. The rejection of the testimony was error. Its admissibility is clear under the rule laid down in *Davidson v. The People*, 4 Colo. 145, where the court quotes from Wharton's Criminal Law as follows:

"Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking the defendant's life."

The fact that the statements made by deceased were not, strictly speaking, threats, is not material, the question being what was his attitude of mind. These statements, offered to be proved, had all been made within a week, and they therefore come within the rule that such evidence must concern the feeling of the party within a very recent time. The fact that he made hostile statements to three different persons during that week tends strongly to show how he felt toward the defendant.

It is further assigned as error that the court sustained an objection to a question to the defendant as to his intent when he struck Page. Under the authorities, the exclusion of that testimony was error.

In Wharton's Criminal Evidence, section 431, it is said: "Ordinarily, as shown elsewhere, a witness cannot be

examined as to another person's motives, but as to the accused's own motives, when relevant, he may be examined in chief, or upon cross-examination. In proving self-defense, he is entitled to testify to the jury, that, at the time of the act charged, he believed himself to be in danger of his life * * *." While such answers are not conclusive, they cannot be ignored, but must be considered in connection with all other evidence in the case. Where an instruction requires the jury to ignore such statements it is error. The inference which the jury may draw from the accused's own statement may be strong enough to overcome the conclusion drawn from other acts and declarations."

The evidence was admissible under *B. & W. R. D. Co. v. L. C. D. & R. Co.*, 36 Colo. 455, 86 Pac. 101, where the question of the admissibility of evidence of intention was directly under consideration. That case was followed in *Minneapolis Steel Co. v. Yeggy*, 69 Colo. 313, 194 Pac. 362.

The more serious objection, however, is to instruction No. 17 in which the jury was instructed, that—

"The law in relation to provocation is that no provocation will justify a person in killing another, nor will it excuse him; hence killing upon provocation will be either murder or manslaughter according to the degree of provocation and its effect upon the person killing."

It is urged that the use of the word "provocation" is so broad as to eliminate all consideration of the defendant's defense that he acted because of the attack upon him by the deceased. That the statement was too general is clear from the case of *Murphy v. The People*, 9 Colo. 435, 13 Pac. 528, in which provocation sufficient to free the party killing from the guilt of murder was discussed. It is there said:

"Provocations, unaccompanied by personal assault, were not infrequently recognized as sufficient."

Mr. Wharton was there quoted as follows:

"The line between those provocations which will and

will not extenuate the offense cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial and from which a great degree of violence does not usually follow, may serve to mark the distinction."

To the defendant, relying upon his plea of self-defense, the question of provocation was vital. When, then, the jury was told that no provocation would justify a killing, nor excuse it, the effect was to withdraw his defense from consideration by the jury. The discussion in other parts of that instruction of what would, and what would not, reduce the killing from one grade of offense to another, does not cure the error. This court has held that where inconsistent statements of the law are made it is impossible to tell which one the jury followed, and inasmuch as it might follow the wrong one, such instructions are prejudicial error.

It is also urged that Mrs. Page, on rebuttal, testified that when she was riding into Glenwood Springs with the defendant, he attempted some familiarities with her. Objection is made that this is not rebuttal. The objection is good. The state had offered no evidence as to any improper conduct of the defendant toward Mrs. Page. Defendant had related a conversation between him and Page concerning such a charge, and the only thing which the state could do in rebuttal was to show that defendant's evidence as to that conversation was not true. After defendant's case was closed, to introduce evidence of misconduct on the part of the defendant was likely to prejudice the jury against him.

That Page was killed by the defendant in a fit of rage was clearly established. Whether or not the circumstances under which the killing occurred were such as to have, to any extent, excused the killing was the question to be determined. Upon that question the defendant was prejudiced by the rejection of evidence, and the admission of

evidence as above stated, as well as by the instructions of the court. For these reasons the judgment should be reversed.

MR. JUSTICE BURKE concurs in the judgment of reversal on the sole ground that there is error in instruction No. 17.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,107.

LARSEN, ET AL. v. WHITFORD, ET AL.

Decided June 5, 1922.

Action to enjoin a sale under a trust deed. Judgment for defendants.

Affirmed.

1. PRINCIPAL AND AGENT—*Agency—Burden of Proof.* The burden of establishing agency is upon the party alleging it.

Record reviewed, and held, that the trial court correctly determined the question in the case under consideration.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. H. A. CALVERT, for plaintiffs in error.

Mr. HENRY E. MAY, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFFS in error, having borrowed money of defendant in error Edith L. Whitford and secured its payment by a trust deed, brought this action to enjoin sale there-

under, and to review a judgment entered against them on their evidence, they prosecute this writ.

The loan in question was made through one Conaway. Plaintiffs alleged that Conaway was the agent of Whitford and the burden was upon them to so prove. If they failed therein, as the trial court found, this judgment must be affirmed, otherwise it must be reversed.

Mrs. Whitford gave her check to Conaway for \$5000.00, the full amount of the loan. Out of this he was to discharge a prior encumbrance of \$2000.00 and pay the remainder for certain improvements as they were made. He discharged the encumbrance and paid \$1700.00 on the improvements. The balance he embezzled. Plaintiffs, contending that this balance covered by their trust deed had never been received by them, declined to make further interest payments, for which default Whitford, taking the contrary view, began foreclosure. Counsel for plaintiffs contends that the arrangement by which Conaway was to make the payments above mentioned constituted him the agent of Whitford under the rule laid down in *Travelers' Ins. Co. v. Jones*, 16 Colo. 515, 27 Pac. 807. In addition to such evidence that alleged agency is further supported by conversations from which it appears that Conaway was an old acquaintance of Judge Whitford, Mrs. Whitford's husband, who expressed confidence in him and surprise at his failure to pay and apparent dishonesty, and indicated at one time a willingness to make good the embezzlement out of his own funds. One of these conversations, in which Judge Whitford indicated that plaintiffs ought not to bear the loss, took place in Mrs. Whitford's presence and when she might have heard it, although there is no evidence that she did so or that she personally ever assumed any responsibility therefor, or ever admitted that Conaway was her agent. Called by plaintiffs as an adverse witness for cross-examination under the statute she testified that neither Conaway nor her husband were ever authorized to act for her.

It further appears that plaintiffs, desirous of making

such a loan, saw Conaway's advertisement in a Denver paper and called upon him, that he knew Mrs. Whitford had this amount of money to loan although he then had none of it in his possession and there is no evidence that he was then vested with any authority concerning it. Plaintiffs did not know whose money they were getting until the papers were made out, and they did not meet either of the Whitfords for some time thereafter. Plaintiffs executed the note and trust deed and authorized Conaway to make disposition of the loan as above mentioned. They paid a commission to Conaway who advised them that one-half of it was to go to Judge Whitford. Mrs. Whitford's check to Conaway was dated the following day. The arrangement for Conaway to pay for the improvements was that such payments should be made on plaintiffs' order, and the \$1700.00 was so paid out. There is no evidence that these orders were to be presented to, or approved in any way by, either of the Whitfords. All of which constitutes very strong evidence that Conaway was plaintiffs' agent.

Travelers' Ins. Co. v. Jones, supra, is correct as far as it goes, and unquestionably states the law, but its facts are not the facts of the case before us. There was in that case a prior relation of principal and agent, collection of interest by the agent and no payment of commission by the borrower.

On the entire record before us we cannot say that the trial court was wrong in holding that Conaway was plaintiffs' agent. It is certainly true that plaintiffs at least did not sustain the burden imposed upon them, i. e., to establish *prima facie* that Conaway was Whitford's agent. Failing in this they were not entitled to injunctive relief. The judgment is affirmed.

MR. CHIEF JUSTICE SCOTT, MR. JUSTICE CAMPBELL and MR. JUSTICE WHITFORD not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,135.

GROMER, ET AL. v. PAPKE.

Decided June 5, 1922.

Action to enjoin the obstruction of a highway. Injunction granted.

Reversed.

1. *PLEADING—Ultimate Fact.* The allegation that a certain street is a public highway, is an ultimate fact, like an allegation of ownership.
2. *General Denial—Evidence.* A complaint alleged that a certain street was a public highway. Under a general denial, the introduction of any evidence tending to disprove the allegation was competent, and it was error to exclude a deed showing the street had been vacated, on the ground that the vacation had not been pleaded.

Error to the District Court of Lincoln County, Hon. Arthur Cornforth, Judge.

Mr. FLOYD J. WILSON, Mr. CHARLES H. BEELER, Mr. FREDERICK SASS, for plaintiffs in error.

Mr. JOHN G. REID, Mr. CHARLES H. HAINES, for defendant in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE defendant in error obtained a permanent injunction against the plaintiffs in error forbidding the obstruction of Boyd street, in the town of Hugo, and they bring error.

The complaint alleged that one Clarke, in 1886, filed a plat with a number of blocks subdivided into lots, which dedicated streets, including Boyd street, and that ever since that time Boyd street had been and remained a public highway; that the plaintiffs owned lots fronting thereon

and that the defendants had obstructed said street with a fence; and prayed for temporary and permanent injunction. Both were granted.

The answer contained a general denial and a statement that the defendants were the absolute and unqualified owners in fee of the obstructed portion of the street. This was denied by the replication.

On the trial the plaintiff introduced the Clarke plat, proved the building of the fence by defendants, gave evidence of damages and rested.

The defendants offered in evidence a deed of vacation, recorded November 16, 1907, which purports to vacate various streets and alleys in accordance with § 6521, R. S. 1908, including the obstructed portion of Boyd street. This was objected to and was excluded by the court on the ground that the vacation had not been pleaded. This was error. The allegation that Boyd street was a highway was an ultimate fact, like an allegation of ownership. See *Baker v. Cordwell*, 6 Colo. 199; *Elliott v. First Nat'l Bank of Greeley*, 30 Colo. 279, 70 Pac. 421; *Updegraff v. Lesem*, 15 Colo. App. 297, 302, 62 Pac. 342. The plat and dedication were one kind of evidence of that fact, like the conveyances by which a plaintiff acquired ownership. Averments of a series of facts by which plaintiff acquired title are mere evidence. *Clink v. Thurston*, 47 Cal. 21; *Cuenin v. Halbouer*, 32 Colo. 51, 74 Pac. 885. See also *Pike v. Sutton*, 21 Colo. 84; 39 Pac. 1084. So of the facts by which the land in Boyd street became a highway. Highway or not was the real issue. The general denial permitted the introduction of any evidence tending to disprove the allegation, and the deed of vacation was competent to that end. *Payne v. Williams*, 62 Colo. 86, 91, 160 Pac. 196; *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912; *Pike v. Sutton*, *supra*. See also *Cuenin v. Halbouer*, *supra*; *Swanson Theater Co. v. Pueblo Opera Block Inv. Co.*, 70 Colo. 83, 197 Pac. 762; *Hallack, etc. Lumber Co. v. Blake*, 4 Colo. App. 486, 36 Pac. 554; *Mott v. Baxter*, 29 Colo. 418, 421, 68 Pac. 220; *St. Louis L. B. B. Co. v. The Colo. Nat'l Bank*,

8 Colo. 70, 72, 5 Pac. 800. It was not a matter of confession and avoidance.

Defendants' allegation that they were owners of the portion of Boyd street in question did not improve their answer, on the contrary it tended to raise an issue of ownership, whereas ownership by defendants was, at most, merely evidence tending to disprove the status as a highway.

It appears from the record that at the date of said vacation the defendants or some of them owned the lots now owned by the plaintiff, but the deed by which they conveyed them, which was of a later date than the vacation, is not shown; we cannot, therefore, consider its effect.

Reversed and remanded.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,153.

PEOPLE, EX REL. FISHER v. LUXFORD, COUNTY JUDGE.

Decided June 5, 1922.

Action in mandamus. Writ denied.

Affirmed.

1. CIVIL SERVICE—*Court Clerks.* The clerk of a court and his deputies are not state officers and are not under civil service.

Error to the District Court of the City and County of Denver, Hon. H. E. Munson, Judge.

Mr. IRA C. ROTHGERBER, Mr. WALTER M. APPEL, Mr. WM. E. HUTTON, for plaintiff in error.

Mr. WILLIAM H. DICKSON, Mr. FRANCIS J. KNAUSS, for defendant in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit in mandamus. The relator seeks reinstatement to the position of bookkeeper and deputy clerk in the office of the clerk of the county court of the City and County of Denver. She occupied that position at the time the civil service amendment to the state Constitution went into effect, and afterwards was removed from the position by the respondent, the County Judge, who proceeded in this matter without reference to any civil service law or regulation. The relator claims the position in question is within the civil service amendment. It is admitted that the position is one of those wherein the incumbent is "an officer of the court." The same designation has been applied by this court to a bailiff in *People v. Morley*, 67 Colo. 331, 184 Pac. 386, and we there said: "Court bailiffs are 'officers of the court,' not 'state officers,' and are not within the terms of said constitutional amendment." This decision was followed in *People v. Hersey*, 69 Colo. 492, 196 Pac. 180, 14 A. L. R. 631, where a jury commissioner was likewise designated as an officer of the court. From these two cases, which are decisive of the instant case, it necessarily follows that a clerk of a court and his deputies are not state officers and are not under civil service. The judgment denying relator relief was correct, and is affirmed.

MR. JUSTICE TELLER and MR. JUSTICE DENISON dissent.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER dissenting:

The majority opinion holds that the relator is not within

the classified civil service because she is not a state officer. I cannot agree with that conclusion.

In no case in which the civil service amendment to the constitution has been construed has that question been involved. Statements to that effect have not been necessary to the judgments rendered, and are merely dicta, not binding upon us. The decisions in question were based upon the fact that state officers, not specifically excepted, are within the classified service, but none of them held, nor was there any ground for holding, that *only* state officers are within that service.

Among the officers excepted from the service are "Judges of courts of record and one stenographer of each judge, *one clerk for each court of record.*" The natural and obvious meaning of this is that all clerks of a court of record except one, are within the classified service. If such is not the intent of the law, this provision is wholly without meaning. If clerks of courts are not within the classified service, there is no possible reason for excepting one clerk from such service.

We have no right to ignore the plain intent of the law, and the judgment should therefore be reversed.

I am authorized to state that Mr. Justice Denison concurs in the views above expressed.

MR. JUSTICE DENISON dissenting:

I cannot agree with the majority opinion either in its argument or conclusion. The relator is within the classified service.

In *People v. Higgins*, 67 Colo. 441, 184 Pac. 365, we held that a water commissioner was within the classified service on the ground that he, being a peace officer, was engaged "in the administration of justice," and therefore was a state officer, following *People v. Curley*, 5 Colo. 412, where it was held that a police judge of the city of Leadville was a state officer. If a police judge and a water commissioner are state officers because engaged in the administration of justice, how can it be said that a deputy

clerk of a court of record is not? The civil service amendment recognizes this, and excepts from the classified service "one clerk for each court of record." There is no reason in this exception, unless it was intended to include in the classified service an assistant or deputy clerk.

The claim is made that this last point is of no force because neither the clerk nor his deputy is within the classified civil service of the state, and therefore cannot be excepted from it, but that claim is groundless since they are within that service because engaged in the administration of justice, as held in *People v. Higgins*.

I am authorized to say that Mr. Justice Teller concurs in this dissent.

No. 10,294.

JOHNSON, ET AL. v. STOVER, RECEIVER.

Decided June 5, 1922.

Action to foreclose mechanic's lien. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. **APPEAL AND ERROR—*Fact Findings.*** Findings of fact by the trial court, supported by sufficient evidence, will not be disturbed on review.
2. **MECHANICS' LIENS—*Property Subject to Lien.*** Under the provisions of section 4029, R. S. 1908, a mechanic's lien attaches to the land of one who knowingly permits his property to be improved, without giving the notice required by the statute.

Error to the District Court of Phillips County, Hon. L. C. Stephenson, Judge.

Mr. AVERY T. SEARLE, Mr. T. E. MUNSON, for plaintiffs in error.

Mr. S. E. NAUGLE, Mr. M. C. LEH, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action to foreclose a mechanic's lien. Judgment for plaintiff. Defendants have sued out this writ of error, and apply for a supersedeas.

On March 5, 1920, a contract was entered into between Mrs. H. E. Johnson, one of the defendants, and The Haxtun Plumbing and Heating Company, of which plaintiff is the receiver. The contract was, as the complaint alleges, "for the plumbing and heating of a certain hotel building then to be erected" upon two certain lots in the two of Haxtun, Colorado, the work to be done by the company, and paid for by Mrs. H. E. Johnson in certain installments as the work progressed. The work was duly completed. The plaintiff, as receiver of the contracting company, filed a mechanic's lien statement.

The answer of the defendants alleges that on June 14, 1920, the contracting company agreed to accept, and did thereafter accept, in part payment for the work done, five promissory notes of one Fred Johnson, each note to be and become due on June 14, 1922.

A portion of the brief of plaintiffs in error assumes these allegations to be true and established, and contends that the mechanic's lien was waived or lost, relying on the rule stated in 18 R. C. L. 971, to the effect that "the acceptance of a note which will not reach maturity within the statutory period for enforcing a mechanic's lien is a waiver of the right to a lien." However, the allegations of the answer in reference to this matter were denied in the replication. The issue was found in favor of the plaintiff, and we cannot hold that the finding is manifestly against the weight of the evidence or that it can be set

aside for any other reason. It is not disputed that the five promissory notes were executed and delivered to an escrow holder, but there is testimony that the agreement on the part of the contracting company was to accept notes maturing in 1920, one on July 1st, one on August 1st, etc., and that there was no agreement to accept, nor was there any acceptance of notes maturing in the year 1922. The evidence is sufficient to warrant the finding of the trial court which appears in the bill of exceptions in the following language:

"* * * There isn't a proof required in this case of an agreement between the company and the owner for modification of the building contract in respect to the payments to be made."

Mrs. H. E. Johnson, the party who contracted for the installation of the plumbing and heating fixtures, was the owner of only one of the lots upon which the hotel building was constructed, in which building the fixtures were placed. The other lot was owned by the defendant Charles J. Johnson. The judgment subjects both lots to the mechanics' lien, and it is contended that it was error to subject the lot of Charles J. Johnson to the lien.

Section 4029 R. S. 1908, (Sec. 4584 M. A. S. 1912) provides, among other things, as follows:

"Any building, * * * and every structure or other improvement mentioned in the preceding sections of this act, constructed, * * * upon or in any land, with the knowledge of the owner * * * of such land, * * * shall be held to have been erected, constructed, * * * or done at the instance and request of such owner or person, but so far only as to subject his interest to a lien therefor as in this section provided; and such interest so owned * * * shall be subject to any lien given by the provisions of this act, unless such owner or person, shall, within five days after he shall have obtained notice of the erection, construction, * * * or other improvement, aforesaid, give notice that his interests shall not be subject to any lien for the same, by serving a written

or printed notice to that effect, personally, upon all persons performing labor or furnishing skill, materials, machinery or other fixtures therefor, or shall, within five days after he shall have obtained the notice aforesaid, or notice of the intended erection, construction, * * * or other improvement aforesaid, give such notice as aforesaid by posting and keeping posted a written or printed notice to the effect aforesaid, in some conspicuous place upon said land or upon the building or other improvement situate thereon."

The defendant Charles J. Johnson, nor any other party, neither pleaded nor proved that he gave or attempted to give the notice provided by the statute above quoted. He was in possession of his lot, and at all times knew of the proposed construction, and the construction of the hotel building and the installation of the fixtures therein. The statute fastens the lien on his land by his knowingly permitting the property to be improved. *Stewart v. Talbott*, 58 Colo. 563, 580, 146 Pac. 771, Ann. Cas. 1916C, 1116. The reason for the statute is that it would be inequitable to relieve his property from a lien for improvements erected thereon with his seeming or real acquiescence. *Grimm v. Yates*, 58 Colo. 268, 278, 145 Pac. 696. See also section 1251 Jones on Liens (2nd ed.)

There is no error in the record. The application for a supersedeas is denied and the judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,344.

WILEY v. THE PEOPLE.

Decided June 5, 1922.

Plaintiff in error was convicted of the crime of rape.

*Affirmed.**On Application for Supersedeas.*

1. **APPEAL AND ERROR—Rulings of Trial Court.** In a criminal case, rulings of the court which are not shown to have prejudiced the rights of the defendants, do not constitute error.
2. **NEW TRIAL—Newly Discovered Evidence.** The rule is, on a motion for a new trial on the ground of newly discovered evidence, that the evidence proposed to be adduced must be sufficiently important to make it probable that a different verdict will be returned on a new trial.
3. **Newly Discovered Evidence—Affidavits.** In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same.
4. **Discretion of the Court.** The disposal of a motion for a new trial, based on the ground of newly discovered evidence, is within the discretion of the trial court, and unless the discretion is abused, the ruling will not be disturbed on review.

Error to the District Court of Pueblo County, Hon. James A. Park, Judge.

Mr. JOSEPH DYE, Mr. BENJAMIN F. KOBERLIK, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES R. CONLEE, assistant, for the people.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was convicted of the crime of rape, and brings error. His counsel contend that the court erred in holding that the prosecuting witness, who had been recalled by the defendant, was his witness, and not subject to cross-examination. This witness had been cross-examined at length by defendant's counsel before being recalled, and there is no showing made as to what was expected to be adduced on further cross-examination, and nothing to show that the defendant was prejudiced by the court's ruling. There are some other assignments of error on the admission and the rejection of evidence, but we find no reason to question the correctness of the court's ruling in those matters. The principal error relied upon is the refusal of the court to grant a new trial upon defendant's claim of newly discovered evidence. The motion is supported only by the affidavit of the defendant, and merely avers that two witnesses have knowledge of facts, reciting them, which, if testified to, would be favorable to the defense. The rule is that the evidence proposed to be adduced must be sufficiently important to make it probable that a different verdict will be returned on a new trial. *C. S. & I. Ry. Co. v. Fogelsong*, 42 Colo. 341, 94 Pac. 356; 29 Cyc. 901.

If the witnesses mentioned in the defendant's affidavit testified to what it is averred they would testify, it does not appear that the evidence would be so far conclusive as to render it probable that a different verdict would be rendered. The application is further insufficient in that it is not supported by affidavits of the newly discovered witnesses. It has been held that, in this jurisdiction, such an application should be supported by an affidavit of the newly discovered witness stating the facts to which he will testify. *Cronin v. Hoage*, 71 Colo. 194, 205 Pac. 271; *Ward v. Atkinson*, 22 Colo. App. 134, 123 Pac. 120.

If such affidavit is not attached to the application, there

should be a showing that it was impossible, or impracticable to secure the same. 29 Cyc. 998.

In any event the disposal of such a motion is in the discretion of the trial court, and that discretion does not seem to have been abused.

There being no error found in the record, the supersedeas is denied and the judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,345.

BENHAM, ET AL. v. WILLMER, ET AL.

Decided June 5, 1922.

Proceeding to establish disputed corners and boundaries of land. Order to advance costs.

Reversed.

On Application for Supersedeas.

1. **APPEAL AND ERROR—Costs—Final Judgment.** A preliminary order that the parties advance certain costs to accrue, and that such order and judgment be a lien upon the lands of litigants, held a final judgment and reviewable by this court.
2. **COSTS—Order.** There is no authority for compelling defendants to advance any part of probable costs to accrue in a litigation, nor has the court power to make a rule to that effect.
3. **Invalid Order.** An order of court which assesses costs not yet accrued, or which affects those who might ultimately be found not to be liable for costs, or who might be taxed with a less amount than in the order specified, is erroneous.

Error to the District Court of Adams County, Hon. Samuel W. Johnson, Judge.

Mr. WILLIAM A. HILL. Mr. E. H. WHITNEY, for plaintiffs in error,

Mr. C. H. PIERCE, for defendants in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS cause is before us on an application for a super-sedeas to review or stay an order, claimed by the plaintiffs in error to be a final judgment in the sense that it may be reviewed by this court. The order in question will be more fully hereinafter set forth, but, briefly stated, it is one requiring the parties litigant herein to pay into court each a certain sum as a deposit for costs.

The main case is a special proceeding, brought under chapter 128, p. 286, Session Laws of 1907, to establish alleged disputed corners and boundaries of lands. There are forty-nine plaintiffs, claiming to be the owners respectively of various tracts of land, the corners or boundaries of which are alleged to be lost, destroyed or in dispute. The defendants number about one hundred sixty and are made parties, apparently, as owners of lands which would be affected by a determination of the corners and boundaries of lands owned by plaintiffs.

The complaint was filed November 7, 1921. A notice bearing the same date, and addressed to all the defendants, was prepared and afterwards filed. The defendants were therein notified that on November 19, 1921, the plaintiffs would apply to the court for the appointment of a commission of surveyors and for the assessment of preliminary costs to be prorated among plaintiffs and defendants. The application was heard by the court after about seventy-five of the defendants had been served with the notice. Various motions regarding the application were interposed and heard, and thereafter and on March 7, 1922, the court made the order of which the plaintiffs in error now complain.

The material parts of the order read as follows:

"It is therefore ordered, adjudged and decreed, by the court, that the parties to this cause that have been served with notice of this proceeding, the owners of land as set forth in the complaint, and each of them, in the said four townships described, to wit:

(Here follows description of four townships)

* * * shall advance sufficient money as costs not to exceed the sum of ten thousand dollars to secure the fees, expenses and compensation of the officers of this court and such commissioners as may be appointed by the court and all other persons who may lawfully perform services or furnish material under the lawful orders of the court herein.

"It is further ordered, adjudged and decreed that each of the parties litigant who are the owners and claimants of land in said four townships as set forth in the complaint herein shall pay on or before the 1st day of May, A. D. 1922, the sum of ten (10) cents per acre upon all lands owned, or claimed by each of them, respectively, and that said money shall be paid in to the clerk of this court and shall be paid out by him from time to time as may be ordered by the court."

Other provisions of the order will be hereinafter noted.

The first question argued is whether the order is a final judgment in the sense that it may now be reviewed. Ordinarily, of course, in civil actions, costs enter into the final judgment rendered on the merits, and any order touching costs made before the entry of the final judgment is merely an interlocutory order and not a reviewable final judgment. In the instant proceeding, however, the order affects the parties litigant, including the plaintiffs in error here, precisely as a final judgment would. The order takes the form of a final judgment, and has the effect of such, as is apparent from further provisions of the same, reading as follows:

"It is further ordered, that this judgment and order be and the same is hereby awarded against each and every of the parties to this litigation who are the owners or claimants of land in the said four townships in the sum hereinbefore named and that execution may issue therefor.

"It is further ordered, * * * that said sum shall be a lien upon all of the lands * * * in the amount herein-

before specified upon each of the litigants' lands respectively, and that said lien may be foreclosed and said lands sold to pay the same."

It is apparent that it would impose a hardship on the plaintiffs in error to compel them to wait until the rendition of a final judgment regarding corners and boundaries before obtaining a review of this order. Their lands might be sold to enforce the lien before such final judgment is rendered, and in that event nothing the court could do in the taxation of costs after the conclusion of the main case would put the present owners of the lands in *statu quo*. The order in question disposes finally of a branch of the case. It meets the test of what is a final judgment in the sense that it is reviewable. It is a final judgment under the reasoning whereby this court has held a judgment or order for temporary alimony to be a final judgment. See *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Bagot v. Bagot*, 68 Colo. 562, 191 Pac. 96.

The next and remaining question is whether it was error to make the order in question. The court in its order designated this assessment or taxation as being in the nature of a docket fee, and provided that upon the final determination of the proceeding the moneys advanced pursuant to the order would be treated and disposed of as moneys usually are when they are paid in or advanced as docket fees. This situation does not validate the order. There is no authority for compelling defendants to advance any part of the probable costs which are yet to accrue in the litigation, nor was the court empowered to make, as it attempted to make in this case, a rule of court to that effect.

It is claimed that this is, as the statute provides (Section 3 of the act hereinbefore cited), a suit in equity, and that, therefore, the court could avail itself of the rule, stated in 15 C. J. 106, to the effect that courts of equity may "give costs in intermediate stages of a cause without waiting for a final decree." That rule, however, has been applied only to accrued costs, and not to future costs.

For example, in *Hand v. Allen*, 294 Ill. 35, 128 N. E. 305, in a suit in which an accounting was awarded, it was held that an order for expenses of reference prior to the accounting was premature. In *Avery v. Wilson*, 20 Fed. 856, it was held that costs may be awarded or taxed where they have arisen about a matter completely disposed of.

The order in question is erroneous for either one of two reasons: (1) There is a taxation of costs, or an assessment for costs, which have not yet accrued; and (2) the order affects those who may ultimately be found not liable for costs, or who might, in the exercise of the court's discretion, be taxed less than some other parties litigant, or a smaller amount than that designated in the order in question.

In connection with the second reason above stated, it may be noted that the order affects all those owning or claiming land in the four townships named. Some of these defendants have filed an answer putting in issue the truth of plaintiffs' allegations concerning alleged lost or disputed corners and boundaries. If such defendants prevail in the suit they may not be liable for costs, or at least not for any part of costs incurred in ascertaining corners and boundaries of lands.

The order is sought to be upheld on the ground that it is necessary to raise money forthwith for the expenses which will arise in connection with the taking of testimony concerning lost or disputed corners and boundaries. This situation, however, does not make it imperative that *defendants* be ordered to advance a part of the money required for such purpose.

The court was not authorized to assess the defendants any sum to be applied to future costs. It was error to grant the order complained of. The judgment or order is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,321.

WILSON v. PEOPLE, ex rel. COCHRANE.

Decided June 5, 1922.

Action in quo warranto to test the right to the office of insurance commissioner. Judgment for relator.

Affirmed.

1. **CIVIL SERVICE—Commissioner of Insurance.** The commissioner of insurance is a state officer, he is not appointed to perform judicial functions, and is within the classified civil service.
2. **Provisional Appointments—Removal.** A provisional employe in the service of the state, who has not been appointed according to merit and fitness as ascertained by competitive examination, is not "in the classified service", and is not entitled to a hearing before removal.

Error to the District Court of the City and County of Denver, Hon. Henry J. Hersey, Judge.

Mr. FRANK C. WEST, Mr. NORTON MONTGOMERY, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. CHARLES ROACH, deputy, Mr. BENTLEY McMULLIN, assistant, Mr. JOHN CAMPBELL, for defendant in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action in *quo warranto* instituted in the district court of the City and County of Denver by the Attorney General, at the request of the Governor, in the name of the people and on the relation of Jackson Cochrane, against Earl Wilson. The subject matter of the action is the title to the office of commissioner of insurance. A judgment was entered for relator, adjudging him to be entitled to the office, and ousting the defendant from the office. The latter brings the cause here for review.

There is no dispute as to such facts as are necessary to dispose of the one ultimate question presented for our determination, namely: Does the defendant, Earl Wilson, have title to the office of commissioner of insurance?

A preliminary question is whether the *office* of commissioner of insurance is within "the classified civil service of the state," within the meaning of the civil service amendment to the state constitution (Section 13, Article XII). It is contended that the answer should be in the negative for the reason that the commissioner of insurance is a person "appointed to perform judicial functions," within the meaning of the exceptions contained in the amendment, and that, therefore, neither the commissioner nor his office is subject to the civil service amendment. This contention cannot be sustained. It may be assumed that some of the duties, considered separately, of a commissioner of insurance are judicial in their nature. However, the commissioner is not appointed to perform judicial functions, within the meaning of the exception in the amendment. He is, beyond question, an officer of the executive department of the state government, and the head of the department relating to insurance. Such an officer is not a person "appointed to perform judicial functions."

The plaintiff in error, defendant below, further contends that notwithstanding it may be held, as it now is, that the office of commissioner of insurance is within the classified civil service of the state, he still has title to the office under the admitted facts hereinafter mentioned.

The defendant was appointed by the Governor to fill a vacancy. The appointment was made on or about November 9, 1920. The civil service amendment having gone into effect prior to that time, namely, on December 31, 1918, it is apparent, and also conceded, that the defendant can have no protection or benefit from the last clause of the amendment which reads as follows:

"All persons holding positions in the classified service as herein defined when this section takes effect shall retain

their positions until removed under the provisions of the laws enacted in pursuance hereof."

The next material, and admitted, fact to be noted is that defendant was not appointed as the result of any competitive test or examination. The appointment was authorized by that clause of the civil service amendment which reads as follows:

"In cases of emergency or for employment of an essentially temporary character, the Commission may authorize temporary employment without a competitive test."

The defendant concedes that his appointment was of a temporary character, but contends that he holds, unless sooner removed on charges after a hearing, until there is an eligible list created as the result of a competitive examination, and that until such eligible list is created he cannot be removed except upon a hearing or an opportunity to be heard.

An eligible list for the position of commissioner of insurance did not exist. Without there having been any examination to create such a list, the defendant was removed from office and deprived of the possession thereof. The removal was, as he claims, without a hearing or an opportunity to be heard upon written charges. This situation raises the question, and the most controverted question in this case, namely: Did the defendant have the right to a hearing?

The third paragraph of the civil service amendment to the constitution contains the following language:

"Persons in the classified service shall hold their respective positions during efficient service * * *. They shall be removed or disciplined only upon written charges, * * * and after an opportunity to be heard."

This clause places "persons in the classified service" in their positions permanently, subject, of course, to removal upon written charges after a hearing. Obviously, therefore, this clause cannot refer to the persons affected by a subsequent clause which empowers the commission to "authorize temporary employment," for otherwise there could

be no "temporary employment." The right to a hearing, and the right to hold a position "during efficient service," is given only to those appointed according to merit and fitness as ascertained by a competitive examination. To hold otherwise would be to nullify the first clause of the amendment which reads as follows:

"Appointments and employments in and promotions to offices and places of trust and employment in the classified civil service of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence, the person ascertained to be the most fit and of the highest excellence to be first appointed."

It is self-evident, also, that to impair the first clause of the amendment would be to destroy the usefulness of the entire amendment. The conclusion is irresistible that the clause of the amendment giving persons the right to hold during efficient service and the right to a hearing before being removed, refers only to persons appointed as the result of standing highest in a competitive test. It is admitted that the defendant is not an appointee of this class. That defendant, being a provisional appointee, was not entitled, as a matter of right, to a hearing before removal, is a proposition sufficiently sustained by the reasoning above followed, but, moreover, the authorities sustain the same conclusion. It is amply supported by the reasoning and the decision of this court in *Shinn v. People*, 59 Colo. 509, 149 Pac. 623. Among other things, relevant in this connection, this court there said:

"The application of the law extends only to those who have taken an examination, and thereby showed the necessary qualifications, and to those who should do so in the future."

In that case, Shinn relied, among other things, upon a section of the civil service statute which provided that discharges from the classified civil service should be made only for cause and after notice and hearing. It was held that Shinn was not "*in the classified service*," so as to be entitled to the benefit of that section, because he had not

taken an examination. The decision on this point was not made to depend on the fact that Shinn's successor was named from an eligible list.

Another case in point is *Fish v. McGann*, 107 Ill. App. 538, affirmed in 205 Ill. 179, 68 N. E. 761, in which the court held that a probationer was not "in" the classified civil service, and was not, therefore, entitled to a hearing before removal. See also *People v. City of Chicago*, 210 Ill. App. 232; *People ex rel. v. Scannell*, 66 N. Y. Supp. 182. The general rule, in cases of this kind, is stated in 29 Cyc. 1411, 1412, to the effect that "limitations upon the power of removal" contained in civil service laws, do not "affect probationary appointments," or persons "not appointed as a result of a competitive examination."

No permanent employment is authorized without a competitive test, and, as noted in a previous part of this opinion, the defendant's appointment was authorized only under that clause of the amendment providing that the "Commission may authorize temporary employment without a competitive test." The defendant's employment or appointment was temporary. How long, then, would he hold? He cannot be permitted to hold until removed upon written charges and a hearing, for such tenure is given only to permanent appointees, holding after being found to stand highest in a competitive test.

The commission is authorized to make rules to carry out the purposes of the civil service amendment, and this includes the right to make rules with reference to the tenure of provisional appointees, such as was the defendant. It will be assumed that defendant's rights depend on such rules, if there are any covering this case, for the other alternative would be to hold that his tenure is at the pleasure of the Governor, the appointing officer, in which event defendant would have no cause to complain of the judgment below.

The civil service commission in paragraph (7) of division XI of its rules has provided as follows:

"Where a provisional appointment has been approved by the State Civil Service Commission to a position in the State government, and the head of a department, * * * desires to be relieved of said appointee for any cause whatsoever, it will be necessary to notify the Civil Service Commission in writing, at least five days before the provisional appointee may be permanently relieved from duty, setting forth fully the reasons for such contemplated dismissal, and it must appear to the Commission to be for the best interests of the service."

This rule was substantially and sufficiently complied with, notwithstanding the fact that the commission instead of the Governor made the first move. On October 6, 1921, the commission wrote to the Governor recommending that he avail himself of the foregoing rule "for the good of the service." On October 7, 1921 the Governor complied, in effect, with the commission's recommendation, and notified it that he would notify the defendant that "his provisional appointment expires" on October 15, 1921, which time was more than five days after the date of the Governor's letter. It was not necessary that the commission again go on record that it appear to it that the contemplated dismissal would be for the best interests of the service, for the reason that the commission had already expressed itself to that effect and a repetition would be a useless formality.

It therefore appears that the defendant was legally removed from his office on October 15, 1921, and there was, therefore, no error in adjudging him to be a usurper of the office of commissioner of insurance at the time of the judgment. The record also contains matters relating to certain charges filed against defendant before the civil service commission prior to the date of his removal, but these matters are immaterial in view of the fact that the defendant was a provisional and not a permanent appointee, and for that reason cannot be considered here for any purpose.

There is no error in the record. The judgment of the district court which excludes the defendant from the office

of commissioner of insurance and adjudges the relator to be the duly appointed and qualified commissioner of insurance and entitled to hold and exercise the office, is affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER and MR. JUSTICE DENISON dissent.

No. 10,351.

LIPPERT v. WRIGHT.

Decided June 5, 1922.

Action to set aside certificate of purchase and sheriff's deed, and for decree of title in plaintiff. Judgment of dismissal.

Reversed.

On Application for Supersedeas.

1. RIGHTS AND REMEDIES—*Real Property—Cause of Action.* Where a party can only assert an equitable title to real property, though his interest may be full and complete, he may, though out of possession, have his equitable remedy, and may unite with it any appropriate cause of action through which he may secure full and adequate relief.
2. PLEADING—*Demurrer.* Allegations of a complaint in an action to set aside a certificate of purchase and sheriff's deed and for a decree of title in plaintiff, reviewed, and held not subject to a demurrer on the grounds of improper joinder of parties defendant and want of facts.

Error to the District Court of Delta County, Hon. Straud M. Logan, Judge.

Mr. C. E. BLAINE, Mr. W. H. BURNETT, for plaintiff in error.

Mr. HENRY J. BAIRD, Messrs. FAIRLAMB & HOTCHKISS, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error was plaintiff below and to review a judgment entered on demurrer to his amended complaint dismissing the action as to Ella Wright he sues out this writ and asks the issuance of a supersedeas. The other defendants below were Charles A. Wright and The Kansas City Life Insurance Company.

One Duvall owned two tracts of real estate, which for convenience we refer to as "A" and "B," subject to a mortgage of \$4500.00 to Pearson. Duvall sold "A" to plaintiff and warranted against encumbrances. More than a year later he sold "B" to Charles A. Wright (husband of Ella Wright) who assumed and agreed to pay the whole mortgage. Failing therein Pearson foreclosed on both tracts and after expiration of the redemption period sold the certificates to Ella Wright. The latter took a sheriff's deed and gave a mortgage on "A" and "B" for \$4500.00 to the Kansas City Life Insurance Company. In addition to the foregoing the amended complaint alleges that the default of Charles A. Wright was in pursuance of a conspiracy between him and his wife to enable them to secure the property and defeat his contract to pay the Pearson mortgage; that Ella Wright's purchase of the sheriff's certificate was made with the funds of Charles A. Wright and the title procured by her through the sheriff's deed was for the joint use and benefit of the Wrights and in fraud of the plaintiff. It further alleges the wrongful possession of "A" by Wright and his wife for two years and the removal of certain buildings therefrom; that the value of said tract is \$3500.00, the amount due on the Pearson mortgage at the time of sale \$5744.00; and the insolvency of Charles A.

Wright. No attack is made upon the good faith of Pearson or the Kansas City Life Insurance Company. The prayer is for \$800.00 for the use of "A," \$1000.00 for the removal of buildings therefrom, cancellation of the certificate of purchase and sheriff's deed, that the title be decreed in plaintiff, that the Kansas City Life Insurance Company be directed to first resort to "B" to satisfy the lien of its mortgage, and if it be necessary to sell "A" thereunder, for an additional judgment against Wright and his wife accordingly.

Other pleadings were filed and proceedings had not now necessary to notice. The demurrer upon which judgment was entered was for improper joinder of parties defendant and want of facts.

BURKE, J., after stating the facts as above.

Counsel for defendant insists that plaintiff's cause of action is one for damages against Charles A. Wright and that defendant's title can only be attacked after judgment against her husband. The position is untenable. If Charles A. Wright acted in good faith and discharged his obligations plaintiff had title to "A" free of encumbrance. Doubtless he might have elected to waive the right thereto and sue for damages. But he did not do so. He seeks here to recover his lost title, not a money judgment in lieu thereof. The sale was legal, and the sheriff's deed valid. The question is: For whom does defendant hold? If she conspired as alleged and bought with her husband's money she does not hold for herself. Charles A. Wright could not by an act of bad faith take from plaintiff the title he had bound himself to protect. Hence defendant does not hold for him but for plaintiff.

If Charles A. Wright had, for the purpose of obtaining "A" under the Pearson foreclosure and contrary to his contract to protect against it, defaulted in the payment of that indebtedness and bought at the sale, it is perfectly apparent that he would hold the legal title under sheriff's deed in trust for plaintiff and equity would compel him to

execute that trust by transferring free of encumbrance.

"Where a party can only assert an equitable title to real property, though his interest may be full and complete,—as where there is some trust to be declared, or legal title to be extinguished, some instrument not void on its face to be cancelled or corrected, or other obstacle to be removed before his rights can be made manifest,—he may, though out of possession, under a system of procedure like ours, have his equitable remedy, and may unite with it any appropriate cause of action through which he may secure the full and adequate relief to which he may be entitled." *Stockgrowers' Bank v. Newton*, 13 Colo. 245, 249, 22 Pac. 444, 445.

If husband and wife conspired for the same purpose and she bought with his money she stands in his shoes and must discharge his obligation.

For the foregoing reasons defendant was a proper party, a cause of action was stated against her and her demurrer should have been overruled. The judgment is accordingly reversed and the cause remanded for further proceedings in conformity herewith.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,085.

CRUMLEY v. SHELTON, ET AL.

Decided March 6, 1922. No change in opinion on rehearing July 3, 1922.

Action for specific performance of a contract for the sale of land. Judgment for defendants.

Affirmed.

1. **PRINCIPAL AND AGENT—*Real Estate—Authority of Agent.*** The authority of an agent to execute a contract for the sale of land must be in writing, and he must be given the power to do that which he assumes to do.
2. **CONTRACT—*By Real Estate Agent—Construction.*** A contract of agency, giving power to sell real estate, is to be strictly construed.
3. **BROKERS—*Real Estate—Authority.*** Where real estate is placed in the hands of an agent with instructions in general terms to sell, he is not thereby authorized to enter into a contract of sale binding upon the owner.
4. **SPECIFIC PERFORMANCE—*Contract Must be Definite.*** To justify a decree of specific performance, the contract sought to be enforced must be reasonably certain and definite.
5. **FINDINGS—*Court Discretion.*** Under the facts disclosed, it is held that the court did not abuse its discretion in finding for defendant.

Error to the District Court of Prowers County, Hon. A. C. McChesney, Judge.

Mr. WILLIAM H. DICKSON, Mr. ROLLIN A. YOUNG, Mr. A. B. MANNING, for plaintiff in error.

Messrs. HILLYER & KINKAID, for defendants in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was plaintiff in a suit to compel defendant in error, Shelton, to perform an alleged contract for the sale of land to the plaintiff. The trial court found in favor of defendants, and the cause is now here for review.

Defendants, Wadsworth and Reading, were a copartnership engaged in the sale of real estate at Holly, Colorado, and defendant Shelton, living at Littleton, owned land in Prowers county, which said real estate dealers were endeavoring to sell for him. Plaintiff in error relied upon correspondence between Wadsworth and Reading and Shelton, as constituting authority to said agents to make the contract upon which the suit is based.

It is alleged that on August 19, 1919, the land in question was listed with said real estate agents, in support of which allegation a letter of that date from Shelton to the agents was offered in evidence. Said letter was in answer to a letter from the agents to Shelton in which it was suggested that they might secure a purchaser who would pay half cash, and the balance in one, two and three years. Shelton advised them that if they got such a proposition he would accept it, if not tied up with a prospect which he then had.

On the 13th of September, the agents sent defendant Shelton the following telegram. "Have showed section eleven today. Wire authority to close for sixty-four hundred net to you. Rush answer as party is looking at other land with improvements." Shelton, on the next day, wired the agents as follows: "If can close at once go ahead." Thereupon the agents entered into a contract with the plaintiff for the sale of the land for \$7,000.00, one-half cash, balance in one, two and three years, they having added \$600.00 as commission. The question to be determined here is, were the agents authorized to enter into a written contract of sale which would be binding on Shelton; and if not so authorized, did the telegrams constitute a contract which entitled the plaintiff to a decree of specific performance. Defendant Shelton testified that his telegram of the

14th of September was sent under the understanding that the \$6400.00 was to be paid in cash. It appears that after this written contract was made by the agents, another contract was drawn by them and submitted to Shelton, after having been signed by the plaintiff. Shelton declined to sign said contract.

If the written contract marked "Plaintiffs' Exhibit A" was the contract of Shelton, by virtue of authority granted to the agents, it may be regarded as definite enough to entitle the plaintiff to a decree for a specific performance. We do not think, however, that the correspondence shows that the agents had such authority.

In *Johnson v. Lennox*, 55 Colo. 125, 133 Pac. 744, this court said:

"It is the rule of law that the authority of an agent conferring power to execute an executory contract for the sale of real estate must be in writing, and that the agent must be given therein specific authority to do, either the general business of his principal or the particular thing which he assumed to do. Also, that the burden is put on the plaintiff who sues upon a contract thus executed, to show that the person who signed the contract as agent, was authorized not only to negotiate the sale, but also to conclude in writing a binding contract within the terms, conditions and limitations expressed in the contract sued on."

In *Springer v. City Bank*, 59 Colo. 376, 149 Pac. 253, Ann. Cas. 1917A, 520, we held that a contract of agency giving power to sell real estate is to be strictly construed. Also, that where real estate is placed in the hands of an agent with instructions in general terms to sell, the agent is not thereby authorized to enter into a contract of sale binding the owner, his authority extending only to finding a purchaser, and to negotiating a sale generally between such purchaser and the owner.

Applying the rule thus laid down to the facts in evidence here, it cannot be said that the contract made by the agents was binding upon Shelton. If there were a contract at all,

it must have resulted from the telegram to Shelton and his reply.

To justify a decree of specific performance of a contract, the contract must be reasonably certain.

"There must have been a clear mutual understanding and a positive assent on both sides as to the terms of the contract." 36 Cyc. 543.

"Each of the material terms must be expressed with sufficient clearness and definiteness to enable the court to ascertain the intent of the parties and to frame its decree in accordance with such intent." Ibid, p. 587.

"A greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages." Pomeroy on Specific Performance, section 159, quoted with approval in *Riverside Land & Irrigation Co. v. Sawyer*, 24 Colo. App. 442, 134 Pac. 1011.

There is nothing in the record which made it unreasonable for the trial court to accept the statement of defendant Shelton as to his interpretation of the telegram from Wadsworth and Reading. It cannot, therefore, be said that the court abused its discretion in finding for the defendant.

The judgment is accordingly affirmed.

MR. JUSTICE ALLEN and MR. JUSTICE DENISON concur.

No. 10,051.

JEWEL v. JEWEL.

Decided April 3, 1922. Rehearing denied July 3, 1922.

Action by divorced wife for additional alimony. Judgment of dismissal.

Reversed.

1. **DIVORCE AND ALIMONY—*Alimony—Modification of Decree.*** A court of equity by virtue of its general powers has authority to modify a decree relative to alimony, when changed circumstances make it just and necessary.
2. ***Alimony—Modification of Decree—Jurisdiction of Courts.*** A decree for a divorce and alimony was granted in the county court. Several years thereafter the wife commenced an action in the district court for additional alimony. *Held*, that the action was not one to modify the county court decree—the amount involved being in excess of its jurisdiction—but an independent suit for equitable relief, which the district court had power to grant.

Error to the District Court of Morgan County, Hon. L. C. Stephenson, Judge.

Messrs. COEN, MALLORY & PAYNTER, for plaintiff in error.

Mr. JAMES E. JEWEL, *Pro se*, Mr. BENJAMIN GRIFFITH, for defendant in error.

Department One.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error began a suit in the district court, and by her complaint alleged that she and the defendant were married in 1871, and were divorced on August 6, 1914. The divorce was obtained in a suit in the county court begun by the defendant in error, and in which the plaintiff in error filed a cross-complaint; the divorce was

granted upon the cross-complaint. The decree gave to plaintiff in error possession during life, of a large house in Fort Morgan, Colorado, in which the complaint alleges plaintiff had lived during the succeeding years and supported herself and defendant's daughter by renting rooms in said house.

The complaint further alleged that the plaintiff was of the age of sixty-seven years, a chronic sufferer from Brights disease, and with vitality so impaired that she was unable to do the work necessary for the care of said house; that she had no other source of income; that she has been compelled to pay a thousand dollars to reduce a mortgage on the property to prevent foreclosure, and that she is unable to support herself on the alimony allowed her by said decree; that the defendant has an income from the practice of law and is possessed of considerable real estate in Morgan county and elsewhere, and is worth approximately \$50,000, over and above all debts and liabilities; that the plaintiff, during the entire married life of forty-three years, kept roomers and boarders and earned considerable sums of money, which she contributed to the joint fund; that the defendant, in order to induce her to consent to the decree concealed from her the fact that he was the owner of a ranch of the value of \$30,000. She further alleges that a fair and proper award to her by way of alimony from the estate of the defendant would be \$20,000; that by reason of the fact that the decree was entered in the county court, in which the jurisdiction is limited to \$2,000, she is unable to have said decree modified by a proceeding in that court. Wherefore she prays judgment for alimony in the said sum of \$20,000 and for other equitable relief, etc.

A demurrer was filed to the complaint alleging that the district court had no jurisdiction to modify the decree of the county court; that the complaint fails to state facts sufficient to constitute a cause of action, and that it is barred by lapse of six months from the granting of the divorce. The demurrer was sustained and the cause is now before us for review on error.

That a court of equity by virtue of its general powers has authority to modify a decree relative to alimony, when changed circumstances make it just and necessary, is asserted by this court in *Stevens v. Stevens*, 31 Colo. 188, 72 Pac. 1060.

The complaint states facts, which, if established, would fully justify a judgment in favor of the plaintiff. This is not as defendant in error supposes, an attempt to modify the decree of the county court; it is an independent suit presenting equitable grounds for relief, and the authorities cited by defendant in error are not in point. That the county court would not have jurisdiction because of the amount involved cannot be disputed, and unless equity can give relief in an independent proceeding in the district court, there would be no relief possible to the plaintiff. If it is true, as plaintiff alleges, that she aided largely in accumulating the property now held by the defendant, it would be intolerable that she, having become unable by virtue of age and sickness, to support herself, and the defendant still having this property, should not be entitled to a reasonable support out of it.

As to the power of the district court to give relief in a case of this kind we have no question; it being impossible to transfer the case from the county court to the district court and thus allow the question to be litigated in the original proceeding. The district court erred in sustaining the demurrer.

The judgment is accordingly reversed and the cause remanded with directions for further proceedings in harmony with the views herein expressed.

MR. JUSTICE ALLEN and MR. JUSTICE BAILEY concur.

No. 10,062.

VOSBURG v. KNIGHT, ET AL.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action for the cancellation of a deed. Decree establishing the rights of the parties in the property.

Affirmed.

1. **APPEAL AND ERROR—*Fact Findings.*** Fact findings by the trial court which are based on conflicting evidence, will not be disturbed on review.
2. **TRUSTS—*Constructive.*** Parents—just before the father's death—conveyed to their daughters all their property. In an action between the daughters concerning the estate, in which the mother intervened asking that a trust be declared in her favor, it is held: That it would require strong evidence to prove that the father and mother denuded themselves of all their property by deed to their daughters without an understanding of some kind, e. g., that they were to be supported out of the income; and in view of the confidential relations between the parties, that must be said to be sufficient to create a constructive trust.
3. **APPEAL AND ERROR—*Real Estate—Conveyance.*** Where one conveyed property to her sister's children by deed and thereafter sought its cancellation, she was in no position to object to a decree which gave her and her sister a life estate in the property, with remainder to their surviving children, she having parted with her title by deed which the court declined to cancel.

Error to the District Court of the City and County of Denver, Hon. Charles C. Butler, Judge.

Messrs. PONSFORD, CARNINE & KAVANAUGH, Mr. JOSEPH D. PENDER, for plaintiff in error.

Mr. WILBUR F. DENIOUS, Mr. CHARLES F. MORRIS, Mr. JOHN W. SLEEPER, Mr. EDWARD RING, for defendants in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

FLORENCE J. VOSBURGH was the plaintiff below and brings the case here on error, complaining of the decree whereby the court charged upon her and her sister, the defendant Grace B. Knight, a trust on certain property and directed how the title thereof should go.

The essential facts are as follows: The defendant in error, Mary K. T. Burnham, is the widow of the late Dr. Norman G. Burnham of Denver. The plaintiff and Grace B. Knight are their daughters, and the defendants in error, Genevieve K. Smith and W. Burnham Knight are the children of Grace B. Knight. The plaintiff has no children.

Dr. and Mrs. Burnham, in his lifetime, gave to each of their said daughters a dwelling-house which does not concern us now, but not long before his death they conveyed to their daughters all their property, amounting, perhaps, to \$100,000 in value.

February 19, 1920, sometime after Dr. Burnham's death, Mrs. Knight and Mrs. Burnham came with a notary to Mrs. Vosburgh's house, bringing a deed which they persuaded her to sign with Mrs. Knight. By this deed the plaintiff and Mrs. Knight purported to convey to Mrs. Knight's children all the said property except the two dwellings above named, reserving, however, to each of the grantors an estate in an undivided half thereof for her life.

Repenting of her act, Mrs. Vosburgh that night consulted an attorney, and shortly after brought suit to set aside this deed, alleging undue influence by reason of her sister's dominating character and her own weakness from illness and consequent mental incapacity. The defendants allege that the purpose of the original conveyance to the sisters was that they should take care of their parents during their lives, retain life estates for themselves, with remainder to their children and that the deed sought to be set aside was made in pursuance of that understanding.

Mrs. Burnham intervened alleging that up to the begin-

ning of the suit the sisters had supported her out of a joint bank account which was made up of the proceeds of the rents from the property conveyed to them, but that since this suit the plaintiff refused to sign checks thereon, and she, the intervener, was thus without support, and, by an amendment, she prayed that a trust be declared in her favor, with the plaintiff and Mrs. Knight as trustees, to maintain the property, collect the income, maintain the intervener out of the net income, using the corpus of the estate, if necessary, for that purpose.

The decree is in accordance with this prayer. It adds, however, a provision in accordance with the answer that a life estate in said property, subject to said trust, is vested in the plaintiff and the defendant Mrs. Knight, remainder to the child or children of their bodies then surviving.

Plaintiff in error argues a number of points all of which we have examined with care, but find it necessary to mention only two: First, that the evidence does not support the finding; second, that the court has established a trust upon oral testimony only.

As to the first proposition it is enough to say that the evidence was conflicting. As to the second we think the court was right. It would require strong evidence to prove that Dr. Burnham and his wife denuded themselves of all their property by deed to their daughters without an understanding of some kind, e. g., that they were to be supported out of the income; and, in view of the confidential relations between the parties, that must be said to be sufficient to create a constructive trust. *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790. It follows that the trust was rightly established by the court so far as the life estates are concerned. As to the remainder to the grandchildren, the plaintiff is in no position to object, for she has parted with her title thereto by deed which the court has declined to cancel; but the life estates and the remainder constitute the whole estate; therefore the validity of the trust cannot be denied.

The judgment is affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT, MR. JUSTICE CAMPBELL and
MR. JUSTICE WHITFORD not participating.

No. 10,130.

MCGINNIS v. HUKILL.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action on promissory note. Judgment for defendant.

Affirmed.

1. JUDGMENT—*Confession by Attorney—Vacation—Affidavit.* A judgment by confession under warrant of attorney must be vacated on motion of defendant made in apt time and supported by affidavit showing a meritorious defense.

Such affidavit need not be complete as the pleading of the defense. If the facts disclosed tend to show a meritorious defense exists, it is sufficient.

2. BILLS AND NOTES—*Fraud.* Evidence reviewed and held sufficient to establish fraud in obtaining a promissory note and renewal thereof, and notice to the holder.
3. JUDGMENT—*Counterclaim.* One who obtains judgment as defendant in an action on a promissory note in which he establishes the defense of fraud, is also entitled to a judgment on his counterclaim for money paid over in the same fraudulent transaction.

Error to the District Court of Yuma County, Hon. L. C. Stephenson, Judge.

Mr. E. B. SIMMONS, Mr. WILLIAM H. GABBERT, for plaintiff in error.

Mr. JOHN G. ABBOTT, Messrs. QUAINANCE, KING & QUAINANCE, for defendant in error.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action upon a promissory note. A judgment was entered for plaintiff, the holder, without service of process upon, or appearance of, the defendant, the maker of the note. The judgment was taken upon a waiver of service and a confession of judgment contained in, and as a part of, the note. The defendant in apt time filed a motion to set aside the judgment, and supported it with affidavits which showed a prima facie case of a defense on the merits. The motion was sustained. It was properly sustained. *Ferguson v. Farmers State Bank*, 67 Colo. 184, 184 Pac. 370; *Richards v. First National Bank*, 59 Colo. 403, 148 Pac. 912; *Cozart v. Haines*, 68 Colo. 261, 188 Pac. 726. The defense, in the affidavits, was, in substance, that the note was obtained by plaintiff by fraud. It is contended that it was error to grant the motion to vacate the judgment for the reason that the facts stated in the affidavits would not be complete as a pleading of the defense. It is not necessary that they should be. If the facts disclosed tend to show that a meritorious defense exists, that is sufficient, for the reason that the vacation of the judgment does not dispose of the case on its merits. If the answer afterwards filed is not sufficient, plaintiff may attack it as in other cases, and if the answer is sufficient, then plaintiff was not prejudiced by an incompleteness in the affidavits filed with the motion to vacate judgment.

The defendant filed an answer and a counterclaim, and without demurring thereto, the plaintiff filed his replication. The cause was tried to the court, without a jury, and resulted in a judgment for defendant upon the complaint, and a judgment for plaintiff on defendant's counterclaim. The plaintiff brings the cause here for review, and defendant assigns cross-error.

The principal contention of the plaintiff in error is that it was error to vacate the judgment first obtained by plaintiff on the confession in the note. This question has been

disposed of hereinbefore. Other contentions are, in effect, that the evidence is insufficient to support the judgment.

The defendant, L. H. Hukill, executed a note to one John B. Selvidge in the sum of \$2,500. to pay for oil leases to be assigned by Selvidge to Hukill. Selvidge had none, and obtained no leases, to assign, and Hukill received nothing of value from Selvidge. Selvidge pledged Hukill's note with plaintiff, but did not transfer it to him, nor did plaintiff become the owner thereof at the time of the transactions herein complained of. Plaintiff, acting as ostensible owner of the note, took it to Hukill, and exchanged it for a new note, being the one involved in this action, and the further sum of \$500. Plaintiff knew, while defendant did not, of facts whereby defendant could defend an action on the original note.

On several matters the evidence is conflicting, but there was evidence upon which the trial court could find all the elements of fraud on the part of plaintiff. This court is satisfied that the result reached below was correct.

If defendant was entitled, under the facts as the trial court viewed them, to a judgment on plaintiff's complaint, the same facts would warrant a return of the \$500 advanced by defendant to plaintiff at the time the renewal note in question was made. If defendant was entitled to the principal relief sought, and the trial court found that he was, he was also entitled to the return of the \$500. Paying this amount over to plaintiff along with the delivery of the new note was one and the same transaction.

The judgment is affirmed, but modified to include a judgment for defendant on his counterclaim. The cause is remanded with directions to modify the judgment as above indicated.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,150.

UNION AUTOMOBILE INSURANCE COMPANY v. SAMELSON.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action on automobile liability insurance policy. Judgment for plaintiff.

Affirmed.

1. **APPEAL AND ERROR—*Fact Findings.*** Findings of fact by the trial court which are supported by the evidence, will not be disturbed on review.
2. **INSURANCE—*Automobile Liability Policy.*** Where an automobile liability policy insures one against loss or expense resulting from claims for damages by reason of the use of an automobile, if the assured incurs a liability to one who is injured by his machine within the conditions of the policy, the insurance company will be liable, notwithstanding the person injured may himself be an assured under the terms of the insurance contract.

Error to the County Court of the City and County of Denver, Hon. George W. Dunn, Judge.

Mr. G. W. HUMPHREY, Mr. S. D. CRUMP, Mr. K. V. RILEY, for plaintiff in error.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. HARRY SOBOL, Mr. GEORGE O. MARRS, for defendant in error.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is an action to recover upon a policy or contract of liability insurance. Prior to the bringing of this action, the plaintiff incurred a liability to one Nathan Snyder by injuring him through the manipulation and use of an automobile. He was sued by Snyder for damages on account of such injury. Snyder obtained a judgment against plaintiff for \$300, which amount the latter thereafter paid. To

be reimbursed this amount by the insurance company, is the purpose of the action brought by plaintiff. The cause was tried to the court, without a jury. Findings and judgment were for plaintiff, and the defendant, the insurance company, brings the cause here for review.

The first contention of the plaintiff in error, defendant below, is that the action by Snyder against the plaintiff in the instant case was a collusive suit. The trial court found the fact otherwise, and the finding is supported by the evidence. It is undisputed that Snyder was injured by plaintiff, and there is evidence to show plaintiff's liability to respond in damages on account of the injury. The defendant insurance company was duly notified of the accident and had an opportunity to defend in Snyder's action against plaintiff.

The plaintiff in error denies its liability in the instant case on the ground that Snyder, as it claims, was also an assured under the policy, and that by reason of that fact, coupled with certain provisions of the policy, the plaintiff, who is the named assured in the policy, cannot recover in this action.

The provisions of the policy, pertinent to this discussion, are as follows:

"Union Automobile Insurance Company does hereby agree to insure the person * * * named, * * * hereinafter called the assured:

"Section II. Against direct loss or expense arising or resulting from claims upon the assured for damages by reason of the ownership, maintenance, manipulation or use of the automobile described * * * if such claims are made on account of: (A) Bodily injuries or death accidentally suffered or alleged to have been suffered by any person or persons as the result of an accident occurring while this policy is in force; * * * This policy is issued * * * subject to the following conditions, limitations, agreements * * *: (16) The assured, wherever referred to under section II of this policy, shall include the assured named in the declarations, and any person or per-

sons while riding in or operating any automobile described in statement 3 of the schedule of declarations for private or pleasure purposes or for making business calls, with the permission of the said named assured, or with the permission of any adult member of the said named assured's family."

Assuming, without conceding or deciding, that at the time of the accident, Snyder was "riding in" and "operating" the automobile, and under paragraph (16) of the policy, above quoted was an assured, this fact does not deprive the plaintiff, who is the assured named in the policy, of the right to reimbursement or to recover under the policy. In other words, there is nothing in paragraph (16) or elsewhere in the policy which deprives the named assured of the right to recover simply because the party who has or had a claim against him happens or happened to be a party himself assured. There is nothing in the policy which modifies the plain provisions of paragraph (A) of section II which indemnifies the named assured for any loss or expense occasioned by certain claims on account of injuries suffered or alleged to have been suffered by *any* person or persons.

Neither the provisions of the policy above quoted nor any others make it material whether Snyder is a member of plaintiff's family or whether he is an assured. If plaintiff incurred a liability to Snyder and sustained a loss or expense on account thereof, the defendant insurance company is liable to plaintiff, if the case comes within section II of the policy.

There is no error in the record. The judgment is affirmed.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE DENISON concur.

No. 10,151.

BOROUGH OR TOWN OF CLARION v. CENTRAL SAVINGS BANK
& TRUST CO., ET AL.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Proceedings involving the validity of items in a will.
Items held void.

Reversed.

1. MUNICIPAL CORPORATIONS—*Charitable Bequest*. Under a statute of Pennsylvania giving municipalities power to hold property for, and make appropriations to maintain libraries, a town could accept a bequest for a library conditioned upon its perpetually maintaining the same.
2. PERPETUITIES—*Charitable Bequest—Condition Subsequent*. A charitable bequest to a municipality is not void under the rule against perpetuities. The fact that to the bequest is attached a condition subsequent does not make the rule against perpetuities applicable.
3. TRUSTS—*Beneficiaries—Interest*. The beneficiary in every trust has an interest sufficient to enable him to be a party in an action in relation thereto. Where a town is the beneficiary, it may prosecute a writ of error as trustee for its citizens.

Error to the County Court of the City and County of Denver, Hon. Ira C. Rothgerber, Judge.

Mr. S. E. MARSHALL, Mr. DON C. CORBETT, for plaintiff in error.

Mr. JOHN M. CAMPBELL, Mr. BERT MARTIN, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THIS is a writ of error to the Denver county court to review the judgment of that court holding item 4 of the will of John D. Ross to be void.

Items 4 and 5 of said will are as follows:

"Item Four. All the rest and remainder of my estate I give, devise and bequeath unto the said Charles C. Ross, as a testamentary trustee, and I hereby direct and authorize him to use, apply and pay out the same from time to time as in his judgment may seem advisable, in the purchase of a suitable building-site and the construction thereon of a suitable fire-proof building in said city of Clarion, to be known as the "Ross Memorial Library," with a suitable auditorium and such reception-rooms, parlors and other accommodations therein as may be convenient for community use in the Borough or Town of Clarion aforesaid, or to use said moneys for such purposes in connection with any other moneys that may be provided by said Borough or Town of Clarion or the inhabitants thereof, for the construction of said Library building, to be always known as the "Ross Memorial Library," this gift being made by me as an enduring memorial to my beloved mother, Mrs. Mary A. Ross, formerly of Clarion, Pennsylvania.

Provided: That before the closing of my estate an ordinance in due form shall be passed by the proper municipal officers and Council of said Borough or Town of Clarion, accepting said gift upon the conditions herein expressed; and agreeing in consideration thereof to perpetually maintain said Library Building as such memorial, and that a suitable tablet shall be placed and perpetually maintained in said Library Building.

Item Five. In case said ordinance shall not be passed and published (if so required by law) prior to the closing of my estate, then the bequest made in paragraph four of this instrument to the said Charles C. Ross, as a testamentary trustee, shall thereby become cancelled, null and void; and in that event, I hereby give, devise and bequeath all the rest and remainder of my estate, after payment of the specific legacies mentioned in Items Two and Three of this instrument, to my said brothers, Albert Ross and Charles C. Ross, and to my sister, Elizabeth Patrick, or to such of them as may be living at the time of my decease, to be di-

vided equally between them share and share alike."

The claim is made: First, that the Town of Clarion (a) has no power to accept the gift or (b) to agree to maintain a library; Second, that the bequest is void under the rule against perpetuities; Third, that the town of Clarion has no interest and so cannot maintain the writ of error.

As to the first proposition, the town of Clarion, under the laws of Pennsylvania, is expressly empowered "to take and hold any property, real or personal, or both, for library purposes;" and "may make appropriations * * * to maintain or aid in the maintenance" thereof. Pa. Acts of 1917, No. 398, p. 1193 et seq.

Second. There is nothing in the claim that this bequest is void under the rule against perpetuities. It is a charitable bequest not subject to that rule. *Clayton v. Hallet*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Haggin v. The International Trust Co.*, 69 Colo. 135, 169 Pac. 138, L. R. A. 1918B, 710.

It is suggested that the legacy in question is made subject to a condition precedent and that the case of *Robbins v. County Commissioners*, 50 Colo. 610, 619, 115 Pac. 526, holds that in such a case the rule against perpetuities applies. The court below was influenced by this argument. Whether or not there is any force in the suggestion, item 5, which fixes the character of the condition subject to which the bequest in item 4 is made, shows it to be not a condition precedent but a condition subsequent. The bequest is made to Charles C. Ross, with no condition precedent, in trust, however, to build the library and turn it over to the town if the town shall accept the gift and agree to maintain it; but if the town will not do so, then the bequest to Charles C. Ross, trustee, "shall thereby become cancelled, null and void," and the property shall go to him and his brother and sister. The condition is therefore subsequent. The title passed at once on the death of the testator to the trustee. The proviso in item four governs not the passing of the title to Charles C. Ross, trustee, but his action as such trustee. See 21 R. C. L., 310, 311.

The court below regarded *Robbins v. County Commissioners* as controlling, but besides what we have said, there is another distinction. The devise, in that case, which was implied, was to take effect on an impossible condition. Here the devise is express, to a named trustee, with defined powers and his duties are based upon a possible condition. There is no analogy between these cases but there is between the present case and *Haggin v. International Trust Co., supra*, which seems to us to be decisive.

Third. The beneficiary in every trust has an interest sufficient to enable him to be a party to an action in relation thereto and upon a decree therein to sue out a writ of error. The town, therefore, as a beneficiary under the trust in Charles C. Ross, can maintain error. True, the rights of the town are for the benefit of its inhabitants, but the fact, if it be a fact, that it has no individual pecuniary interest is immaterial. The rights of its beneficiaries, that is the inhabitants, who would use the library, "were injuriously affected by the judgment." Therefore the town as a trustee for its citizens can maintain error. *Denison v. Jerome*, 43 Colo. 456-462, 463, 96 Pac. 106.

The judgment is reversed, with directions to admit the whole will to probate and proceed accordingly.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 10,167.

THE WOLF COMPANY v. STATE BANK COMMISSIONER.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action for breach of contract. Judgment for defendant.

Reversed.

1. **BANKS—Liability for Failure to Follow Instructions.** Where a consignor of goods, forwards to a bank the bill of lading with instructions to deliver it to the consignee on compliance with certain requirements, and the bank fails to follow the instructions, it cannot escape liability for damages on the ground of ultra vires.
2. **BANKS AND BANKING—Instructions—Evidence.** Evidence reviewed and held not to support the contention of a bank that it substantially followed instructions received, and was therefore not liable for damages caused by its alleged failure in that regard.
3. **Contract—Breach—Liability.** Where a bank is instructed to deliver a bill of lading on compliance with certain requirements by consignee, and it fails to follow instructions, to the damage of the consignor, there is a breach of a valid contract for which the consignor is entitled to nominal damages at least, if not more, and the fact that the damaged party compromises his claim against the consignee does not affect his right to a verdict, but only the amount thereof.

In such a case the bank is not in the position of a surety, it merely broke its contract; but even if a surety, it would have the burden of showing it was injured by the compromise.

Error to the District Court of Montrose County, Hon. Thomas J. Black, Judge.

Mr. HUGO SELIG, Mr. L. C. KINIKIN, for plaintiff in error.

Messrs. CATLIN & BLAKE, Messrs. MOYNIHAN, HUGHES, KNOUS & FAUBER, for defendant in error.

MR. JUSTICE DENISON delivered the opinion of the court.

THE Home State Bank was defendant below and a ver-

dict was directed in its favor. The Wolf Company, plaintiff below, brings error.

The essential facts are as follows:

The Wolf Company shipped machinery to the Farmers' Mill & Elevator Company and mailed the bill of lading to the defendant bank with a sight draft for \$1,367.90 and three unsigned notes for \$980.10 each and with instructions to deliver the bill of lading on payment of the draft, execution of the notes and a mortgage securing them.

The letter of instructions contained the following:

* * * The notes to be secured by a first mortgage on the mill building and machinery, including the machinery furnished by our company. * * * Will you kindly have your attorney arrange the mortgage papers being careful to see that we are furnished with a first mortgage on the mill building and the machinery, including the machinery furnished by our company. * * * For your information will state that the usual charge made by banks for similar service is \$10.00, which amount you may deduct from the amount of our draft, remitting to us for the balance."

There was evidence, which, since the verdict was directed, we must take as true, that the cashier of the bank did not employ an attorney, but himself drew a chattel mortgage and included therein the Elevator Company's mill building, that he then gave it to the secretary and general manager of that company for execution and acknowledgment but employed no attorney to see that this was properly done and did not himself see to it, but accepted it without an examination by an attorney. The instrument was so improperly signed and acknowledged that we held it to be void as against subsequent incumbrancers without notice, *Best & Co. v. Wolf Co.*, 67 Colo. 42, 185 Pac. 371. On receipt of this mortgage with the signed notes and payment of the draft the bill of lading was surrendered, the \$10 deducted and the balance remitted. The Elevator Company afterwards became insolvent and its property ultimately reached the hands of a receiver.

After reversal and remand of the former case, the Wolf

Company, still claiming that its mortgage was valid, on the ground that Best & Company had had actual notice thereof, compromised for \$1350 its claim upon the proceeds of the mortgaged property, which had in the meantime been sold by the receiver, and then brought the present suit against the bank for breach of contract in failing to obey its instructions.

The breaches alleged were that defendant did not have its attorney arrange the mortgage papers and was not careful to see that the plaintiff company was furnished with a first mortgage on the mill building and machinery, and failed and neglected to furnish plaintiff with a first mortgage on the mill building or a first mortgage on the machinery. The defenses were, in substance: 1. *Ultra vires*; 2. that the instructions were substantially followed; 3. that the plaintiff company compromised its suit against Best & Company. We are told by the briefs that upon 1 and 2 the court was with the plaintiff, but upon 3, the facts being undisputed, directed a verdict for the defendant.

As to *ultra vires* we think the court was right. The transaction is a very common one in banking, akin to the deposit of an escrow, a bill of lading or some other instrument to be delivered on receipt of money and documents "arranged" by (i. e. prepared by or under the oversight of) an attorney. There might be something in this objection if the bank itself had been required to determine the validity of the mortgage, but the instruction was to have an attorney do that.

As to the second point, we think the instructions are plain and unambiguous and were not substantially followed. As to the mortgage they were not followed at all. No attorney drew or passed upon the validity of the execution of the mortgage, and it actually was so insufficiently executed and acknowledged as to be of no value against subsequent incumbrancers without notice.

These considerations answer the third point. Since there was a valid contract and a breach thereof the plaintiff was entitled to nominal damages at least, (17 C. J. 720-727;

Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781) ; even if not more. *Allen v. Conrad*, 51 Pa. 487, 490; *Swan v. Saddle-mire*, 8 Wend. 676. The breach proved was surrender of the bill of lading without getting an attorney to oversee the mortgage. The mortgage was invalid in its principal purpose, that is, against subsequent innocent claimants, and even if Best & Company had actual notice of the mortgage and so would have been defeated in the former suit, still the contract was broken; the judgment in that case, therefore, was not an essential part of plaintiff's proof of a cause of action but went only to prove the amount of damages. The fact, then, that it was a compromise judgment had no effect on plaintiff's right to a verdict but only on the amount thereof. It follows that the court was wrong in directing the verdict.

We can see nothing in the bank's position that gives it the right of a surety. Its liability is not collateral to another's; it merely broke its own contract; but, even if the bank were a surety, it would have the burden of showing it was injured by the compromise. *North Ave. Sav. Bank v. Hayes*, 188 Mass. 135, 74 N. E. 311; *State Bank of Lock Haven v. Smith*, 155 N. Y. 185, 49 N. E. 680. But for all shown in the record it may be \$1350 better off. *State Bank of Lock Haven v. Smith*, *supra*.

Reversed and Remanded.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT, and MR. JUSTICE WHITFORD concur.

No. 10,190.

SIMPSON v. NELSON.

No. 10,191.

SIMPSON, ET AL. v. NELSON.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Actions for specific performance and forcible entry and detainer. Judgments for defendant in error.

Affirmed.

1. STATUTE OF FRAUDS—*Option by Agent.* In the absence of written authority from a wife, the owner of real property, to her husband, authorizing it, a lease and option given by him on a part of the land was void under the statute of frauds.
2. CONTRACT—*Written—Parol Evidence.* Parol evidence is not admissible to vary the terms of a written contract.
3. PRINCIPAL AND AGENT—*Ratification.* Where a husband gave a lease and option on land belonging to his wife, without written authority, and she thereafter accepted as interest, payments made thereunder, that constituted a ratification of the contract on her part.
4. SPECIFIC PERFORMANCE—*Mortgage on Property Involved—Effect.* The fact that land, upon a part of which a lease and option is given, is covered by a mortgage, will not prevent the enforcement of the contract. It is the business of the person giving the option to clear the title.

Error to the District Court of Elbert County, Hon. Arthur Cornforth, Judge.

Messrs. HENRY & FERGUSON, for plaintiffs in error.

Mr. BENJAMIN C. HILLIARD, Mr. JOSHUA GROZIER, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

THE two cases above entitled have been considered together and will be determined with one opinion:

Annie F. Simpson, plaintiff in error, was the owner of 2600 acres of land in Elbert county subject to an incumbrance of \$3500. In 1903 her husband, William Simpson, without any written authority from her, gave a lease and option on 320 acres of said land to the defendant in error, Nelson. The last renewal of said instrument expired December, 1910, but Nelson remained in possession, constantly demanded a deed but was told the mortgage stood in the way but would soon be removed and that he then should have it. William Simpson died in 1917. Nelson continued to pay each year what plaintiff in error claims was rent and he claims was interest to D. Hardy Simpson, the son of William Simpson and Annie F. Simpson, plaintiff in error; and he, without, however, written authority from his mother, gave receipts to Nelson for "interest."

In 1919 Mrs. Simpson served notice to quit upon Nelson and brought suit in forcible entry and detainer. He answered, claiming to be the equitable owner and later brought suit upon the lease and option for specific performance. Both those suits were determined in his favor, and are here on error.

It is true, as Mrs. Simpson claims, that, since there was no written authority from her to her husband authorizing it, the lease and option was void under the statute of frauds. The fact that she was present and heard the oral contract which was afterwards consummated by the writing would amount to no more than oral authority from her to him, which would be void. So of verbal authority from Mrs. Simpson authorizing any ratification of the lease and option, and, of course, parol evidence was not admissible to vary the terms of the writing by showing that it was intended to be a contract of sale; and the son's acceptance of money paid as interest and his receipts for interest are not sufficient, because even so she might have taken it as

rent. There is some evidence, however, that she took it as interest and we must assume that the court so found. That constituted ratification and is sufficient to justify the decree in the suit for specific performance, and, of course therefore, the judgment in the forcible entry and detainer suit.

We see nothing in the point that the blanket mortgage prevented the enforcement of the contract. If the contract to convey was valid, it was Mrs. Simpson's business to clear the title.

As for *lashes*, we can see none in the record.

Judgment is affirmed in both cases.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER sitting as chief justice.

No. 10,260.

CANON CITY INDUSTRIAL STORES Co. v. McINERNEY.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action on promissory note. Judgment of dismissal.

Reversed.

1. **PRINCIPAL AND AGENT—*Agent's Authority*.** One who deals with an agent is, by the knowledge of the agency, put upon inquiry as to the agent's authority, and he accepts the agent's statements of such authority at his peril.
2. ***Contract—Statements of Agent*.** One who signs a contract containing the statement, that no agent is authorized to change, add to, or detract therefrom, is bound thereby, and he cannot defend an action on the contract, on the ground that he trusted,

and relied upon representations of the agent, because of his long acquaintance with him and belief in his integrity.

Error to the District Court of Fremont County, Hon. James L. Cooper, Judge.

Mr. D. W. ROSS, Mr. JAMES T. LOCKE, for plaintiff in error.

Mr. E. H. STINEMEYER, Mr. I. W. IBBOTSON, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error began an action against defendant in error to recover upon a promissory note given for the balance of a sum agreed, in a subscription contract, to be paid by the defendant in error for two shares of stock of the plaintiff in error. The contract was set out in full in the complaint. The defendant filed an answer alleging that the note was given without consideration; and for a second defense that he had been induced to sign the note and contract by misrepresentations made by an agent of the plaintiff, whom he had known for many years, and in whom he had great confidence.

A demurrer to the second defense was overruled. The plaintiff elected to stand upon its demurrer, and the case was dismissed. The ruling on the demurrer is before us for review.

Defendant in error relies upon *Colorado Investment Co. v. Beuchat*, 48 Colo. 494, 111 Pac. 61. In that case there is nothing to show what the authority of the agent was, and the opinion discusses the contract without regard to the agency feature. It is treated as if made in fact by the investment company. The court says:

"As between the original parties, one who has intentionally deceived the other to his prejudice, is not to be heard to say, in defense of the charge of fraud, that the party defrauded ought not to have trusted him."

In this case plaintiff in error is not alleged to have made the misrepresentations; they were made by one acting as its agent. The contract itself contains a statement which warns any one signing it that it contains all the terms of the agreement. It reads as follows:

"I hereby declare that I am subscribing for this stock solely upon the conditions stated in this contract, and the statements contained in the company's printed literature with its name attached thereto,—and I fully understand that no agent or representative of the company has authority to in any manner change, add to, or detract from the same."

The facts in this case are so different from the facts in the case above cited, that it is not authority upon the question here under consideration. In any event, we are not disposed to extend the rule announced in that case beyond the facts therein stated. We are unwilling to agree that because one dealing with an agent has a high opinion of said agent's integrity, he is authorized to assume that the agent possesses all powers which he claims.

The universal rule is that one who deals with an agent is, by the knowledge of the agency, put upon inquiry as to the agent's authority, and he accepts the agent's statements of such authority at his peril. *Saul v. Lapidus*, 46 Colo. 538, 105 Pac. 863; *Witcher v. Gibson*, 15 Colo. App. 163, 61 Pac. 192. Where a principal includes in the contract offered for signature, a statement like that contained in this contract, a person who accepts the agent's statement as a basis of the transaction cannot avoid the effect of his trusting to the agent, by alleging long acquaintance and a belief in the agent's integrity. If the statements made are not in accord with the contract, and the party has acted upon them to his injury, he must abide the result of his negligence in not observing the warning contained in the contract itself.

In *Balcom v. Michael*, 68 Colo. 407, 191 Pac. 97, we had before us the question as to the right to rely upon oral statements of an agent by one who had signed a contract

containing substantially the same warning as is in this contract. We held that such statement was binding upon one who had signed the contract.

The court erred in overruling the demurrer to the second defense, for which reason the judgment is reversed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,266.

TRAVELERS INSURANCE CO., ET AL. v. INDUSTRIAL COMMISSION, ET AL.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action involving the constitutionality of a portion of the workmen's compensation act relating to insurance. Constitutionality upheld.

Affirmed.

1. CONSTITUTIONAL LAW — *Workmen's Compensation — Insurance.* That part of section 22 of the workmen's compensation act of 1919, providing that the industrial commission shall prescribe the form of contract of insurance for use in insuring compensation, is administrative only, and not unconstitutional as delegating legislative power.
2. *Delegation of Legislative Power.* Before a statute can be held unconstitutional as delegating legislative power, it must clearly appear that the power in question is purely legislative.
3. WORDS AND PHRASES—"Legislate." To legislate, is the power to enact laws.
4. "Law." A law is a rule of action prescribed by authority.
5. "Prescribe." To prescribe, means to dictate, to positively command.

Error to the District Court of the City and County of Denver, Hon. Henry J. Hersey, Judge.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. JOHN P. AKOLT, for plaintiffs in error.

Mr. VICTOR E. KEYES, attorney general, Mr. JOHN S. FINE, assistant, Mr. SAMUEL CHUTKOW, assistant, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

SUCH is the record before us that, if a portion of section 22 of our Workmen's Compensation Act (L. 1919 p. 708) is constitutional, the judgment must be affirmed. If unconstitutional reversed. That part of the section reads:

"The Industrial Commission shall from time to time approve and prescribe a standard or universal form, as nearly as possible, for every contract or policy of insurance, endorsement, rider, letter, or other document affecting such contract, for use in insuring the compensation herein provided for."

Plaintiffs in error say this is a delegation to the commission of a legislative power and prohibited by the Constitution. If it is such a delegation it requires no citation of authority to establish the prohibition. The authorities cited in support of the contention that the power thus delegated is legislative are the following: *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915A, 283; *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110; *Anderson v. Man. Fire A. Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400; *Dowling v. Lan. Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *O'Neil v. Am. Fire Ins. Co.*, 166 Pa. 72; 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650.

Each of these cases deals with the general subject of insurance. In each the legislature, entering the theretofore open field of insurance contracts, had delegated to a commission, or commissioner, the power to make obligatory regulations concerning such contracts. In each the entire act in question fell if the delegated power were not upheld and in each the court held this to be a delegation of legislative power. No one of them dealt with the insurance feature of workmen's compensation, or any similar subject, hence they are not necessarily controlling here.

The general rule which must guide us in the determination of this question is well stated in *State v. Public Service Commission*, 94 Wash. 274, 279, 162 Pac. 523, 525.

"The constitutional division of all governmental powers into legislative, executive and judicial is abstract and general. Their complete separation in actual practice is impossible. The many complex relations created by modern society and business have produced many situations which can be adequately met only by vesting in the same administrative officers or bodies powers inherently partaking, to some extent of any two or all of these three functions."

Hence the rule that before a statute can be held unconstitutional as delegating legislative power it must clearly appear that the power in question is purely legislative. *Id.*

The reason for the rule that a legislative power may not be delegated should first be noted. The power to "legislate" is the power to enact laws. A "law" is a rule of action prescribed by authority. To "prescribe" means to dictate, to positively command. Such laws, being obligatory, leaving no option to those upon whom they operate, the people, who confer the authority, have a right to know by whom the power will be exercised, and having selected that agency with confidence in its judgment in the exercise of the wide discretion vested in it, have a right to demand that such powers will not be delegated to unknown agents and their original authors be thus subjected to an exercise thereof un contemplated. To secure this protection the people have, by constitutional enactment, limited the exercise

of this great power to those directly chosen by them and specifically authorized thereto.

Our Workmen's Compensation Act contains 153 sections. But ten of these relate directly to the subject of insurance. The disputed portion of section 22 might be wiped out and the act remain unimpaired. This portion therefore is but an administrative incident. If the Industrial Commission failed to prescribe a standard form of policy not even the insurance feature of the Act would be seriously interfered with.

"It is to be borne in mind that the act was complete when it passed the General Assembly. The completeness of a statute when it leaves the hands of the legislature is one of the strongest proofs that it is not a delegation of legislative power. 6 R. C. L. 165. It was not left to go into effect upon a contingency." *Sayles v. Foley*, 38 R. I. 484, 504, 96 Atl. 340, 348.

Moreover our Workmen's Compensation Act is optional. Employer and employee may bring themselves within its terms or stay out as they elect. Compensation insurance is a new field created by the Act. No occupied territory is interfered with. The standard policy clause operates only on those who elect to become subject thereto. The form of policy is not forced upon them. It is no condition precedent to further operation in a field theretofore open. Moreover, having elected to come within the terms of the act the employer is given a choice of three methods of insuring his liability; he may carry the insurance personally, or in the state fund, or in a private company. The latter privilege has attached to it the condition that the form of policy used must be that prescribed by the commission. In so far as this is dictation to the insurance company it is dictation by the employer rather than by the law, the fixing of the form by private contract rather than by statute. The employer in effect says, "I have elected to take advantage of the act, and of the three methods of insurance I have elected to cover my liability in a private company. My right to make this election is based upon a condition

which I have accepted. You must therefore write me the form of policy prescribed by the commission. Otherwise I will do no business with you." When the insurance company elects to write the risk it must comply with the condition thus fixed. There is in all this no element of legal compulsion, hence the power to prescribe the policy form is not legislative in the sense in which the delegation of such power is prohibited.

The judgment is accordingly affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,285.

RUDE, ET AL. v. WAGMAN, ET AL.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action for appointment of a receiver for corporation and for an injunction. Judgment for plaintiffs.

Reversed.

On Application for a Supersedeas.

1. CORPORATIONS—*Suits by Stockholders.* Without a showing that the corporation cannot, or will not bring an action to prevent or redress supposed injuries, a court of equity cannot appoint a receiver at the suit of a minority stockholder and thus take the management of the corporation out of the hands of its directors and stockholders, even for a limited time.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. J. E. ROBINSON, for plaintiffs in error.

Mr. WILLIAM H. DICKSON, for defendants in error.

MR. JUSTICE WHITFORD delivered the opinion of the court.

THIS action was instituted by Abner Wagman, Plaintiff, v. The Marshall Coal Company, I. Rude, Otto Hasbach, and N. Weinberg, Defendants. The defendants Rude and Weinberg were minority stockholders of the defendant corporation.

The complaint alleged that the plaintiff "brings this action as president and a director of the company and as a stockholder and as a creditor for and on his own behalf, and on behalf of all other creditors and stockholders." The prayer was for the appointment of "a receiver to take charge of the property and assets of the defendant The Marshall Coal Company for the purpose of preserving and protecting the same from the waste and depreciation, injury and damage now resulting through the wrongful acts of the individual defendants," and for an injunction against the individual defendants, and for an accounting between the three individual defendants and the defendant Coal Company, and for costs and general relief. The three individual defendants interposed a general demurrer to the complaint on the grounds that the facts therein alleged were insufficient to entitle the plaintiff to an injunction, or to the appointment of a receiver of the defendant company. The demurrer was overruled, and after answers filed and a hearing, a receiver was appointed. To review that order defendants bring error and ask for a superseas.

The demurrer should have been sustained. The averments of the bill are insufficient to give the plaintiff as a stockholder a sufficient status to maintain the action.

It is elementary that:

"The right of a stockholder to sue in equity to prevent or redress injuries to the corporation, * * * is not unlimited, but depends upon his inability to obtain relief

through the corporation or its officers. The right to sue is primarily in the corporation; and in order that a stockholder may sue in his own name, he must show in his bill or complaint that he has made every reasonable effort, in good faith, to obtain relief within and through the corporation by requesting the directors or other officers to sue or take other proper steps, and, on their refusal to do so, by applying to the stockholders; or else he must show that such a request and application would be useless because the directors and majority of the stockholders are themselves guilty of the wrongs complained of, or because the directors refuse to act, or are guilty of the wrongs, and there is no time or power to call a meeting of the stockholders, or because the majority of the stockholders are parties to or approve the wrongs, etc. Without such a showing as this, a bill or complaint by a stockholder, where the injury is to the corporation, is demurrable." Clark and Marshall on Corporations, Sec. 543.

There was an entire absence of these essential allegations in the bill which were necessary to establish the right of the plaintiff to maintain the suit. No showing whatever was made why the corporation did not or could not bring the action to prevent or redress any supposed injuries to the corporation. Without such a showing a court of equity cannot appoint a receiver at the suit of a minority stockholder and thus take the management of the corporation out of the hands of its directors and stockholders, even for a limited time.

The supersedeas will be denied and the judgment is reversed, and the cause is remanded to the court below with directions to require the receiver to deliver the possession of all the property and assets received by him as such receiver to the person from whom he acquired such possession, and to discharge the receiver and to dismiss the complaint.

Supersedeas denied, judgment reversed and remanded.

MR. JUSTICE TELLER and MR. JUSTICE DENISON concur.

No. 10,308.

BOOK v. BOOK.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action to quiet title. Judgment for plaintiff.

*Reversed.**On Application for Supersedeas.*

1. **APPEAL AND ERROR—Fact Findings—Presumption.** Where no specific findings are made by a trial court, the court of review will not presume the determination of a fact contrary to the weight of the evidence.
2. **DEEDS—Present—Escrow.** A deed placed in the hands of a third person to be delivered to the grantee on payment of the purchase price, is not a present deed, but one in escrow and passes no title until performance of the condition.
3. **Title.** An instrument which may never convey title, although known to exist by a subsequent grantee taking for value, in good faith, without fraud, cannot prevent the subsequent deed from becoming effective.
4. **Title—Conveyance.** One who executes a deed and places it in the hands of a third party for delivery on payment of the purchase price, does not thereby part with his title, and a subsequent deed executed and delivered before the performance of the escrow condition, passes the title.
5. **Not Set Aside for Trivial Reasons.** If a deed is made by one seized in fee and having a perfect right to convey, other persons cannot question its efficacy in giving title to the grantee, except upon the ground that they are creditors of, or bona fide purchasers from the grantor, or are holders under such purchasers or have authority from them.
6. **REAL PROPERTY—Quieting Title—Possession.** One not in possession of real estate may not maintain an action to quiet title thereto.
7. **RULES—Supreme Court—Rehearings.** Rule 47 of the Supreme Court concerning petitions for rehearings, discussed.

Error to the District Court of Prowers County, Hon. A. F. Hollenbeck, Judge.

Messrs. GOODALE & HORN, Messrs. ROGERS, JOHNSON & FULLER, for plaintiff in error.

Messrs. HILLYER & KINKAID, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

DEFENDANT in error brought suit against plaintiff in error, and her father, James A. Goodwin, to quiet title to land of which he claimed to be the owner in possession. Defendant Goodwin disclaimed. The other defendant, the plaintiff in error, denied plaintiff's ownership and possession, and set up that the land had been entered under the United States Homestead Act by her brother, who died before he had fully complied with said law, under which, when the entry had been perfected after his death, title would vest in the said James A. Goodwin, as sole heir of said entryman; that on the death of her said brother her father agreed with her that she should take possession of the said land, and perform such acts as were required to perfect said entry, and make the necessary proof thereof before the government land office; that he would, upon obtaining title to said land, convey the same to her; and that under said agreement she took possession of the land, fenced and cultivated a portion of it, and at her sole expense made proof, upon which a patent issued to her father, as such heir. By cross-complaint she alleged that since the taking of possession as aforesaid, she had been in full actual and notorious possession of said land, and that in the meantime her father had conveyed the same to her by deed, which was duly recorded on October 4, 1920. She prayed that title be quieted in her.

The court made no specific findings, but found generally for the plaintiff, and adjudged that title was in him.

From the record it appears that under date of September

11, 1919, said James Goodwin executed a deed to the defendant in error, Roy Book, and placed the same in the bank at Lamar, to be delivered on the payment of \$1200, the purchase price of said land, and upon the further condition that the grantee, by appropriate proceedings, establish the right of said grantor to the land as heir of the entryman.

Twelve days after the recording of the deed to the plaintiff in error, the deed which had been held by the bank was, by the consent of the grantor, delivered to the grantee. The plaintiff in the action admitted on the trial that he was never in possession of the land in litigation.

The court having made no specific findings we are unable to determine upon what ground he found for the plaintiff. The evidence in support of the allegation of the oral contract between plaintiff in error and her father is direct, and for the most part undisputed. There is no positive and credible evidence to the contrary. It is not disputed that Goodwin—who lived in Kansas,—was in this state, and with his son—the entryman—at the time of the latter's death in January 1916; that his daughter, the plaintiff in error, was there also; that she paid her father for a small building on the land in controversy,—took possession of it in April 1916, fenced, and cultivated a part of it during the following years, and made the required proof in the United States Land Office, on which a patent issued to her father, who later deeded the land to her.

Both she and her husband testified to the making of the oral agreement, and her brother testified that her father said in his presence that he had agreed to deed the land to plaintiff in error if she would perfect the entry and make the necessary proof. Goodwin did not deny this testimony of his son. He admitted that his daughter made the proof, and that he deeded the land to her. As to the making of the oral agreement his testimony is evasive. Twice in response to a question as to the agreement he said "I didn't tell her nothing." In answer to a question as to what conversation he had with her regarding the land, he said, "I

don't remember anything about it." His subsequent denial that he had made an agreement with her concerning the land is so qualified by his statement that he remembered nothing about it, that it cannot be deemed a positive denial of the agreement, especially in view of his having deeded the land to her. In this state of the evidence we cannot presume that the court found for the plaintiff on this question.

For the defendant in error it is contended that the deed to him was in fact a present deed, in that, as it is alleged, it was to be delivered on an event certain, and therefore not within the rule which ordinarily applies to escrow agreements. We cannot agree with this contention. The deed was held upon conditions which might, or might not, be performed. It cannot be said, then, that the deed was deposited for delivery upon an event certain to happen. Neither the payment of the balance of the purchase price, nor the decision in favor of the grantor's right to the land as heir, was a matter of certainty.

Defendant in error contends, further, that knowledge on the part of plaintiff in error that her father had made the deed left with the bank rendered the deed to her void. No authorities to that effect are quoted, and we know of no rule which, under the circumstances of this case, would thus render her deed void.

The contention is based upon the proposition that the deposited deed conveyed title, which is not the fact. An instrument which may never convey title, although known to exist by a subsequent grantee, taking for value and in good faith, cannot have the effect of preventing such deed from taking effect.

When the deed to the daughter was made, the grantor had full title, both legal and equitable, and it passed by his conveyance to her. *Wolcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675; *Galvin v. Stokes*, 68 Colo. 376, 191 Pac. 117.

Speaking of a deed delivered to a third person, the court in *Foster v. Mansfield*, 3 Metcalf, 412, 37 Am. Dec. 154, said:

"Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently."

No charge is made that plaintiff in error's deed was obtained by fraud, and the only ground upon which it appears the court could have set it aside must have been that it was void because of defendant's knowledge of the escrow agreement.

Deeds will not be set aside for light or trivial reasons.

"If a deed is made by one seized in fee and having a perfect right to convey, other persons cannot question its efficacy in giving title to the grantee, except upon the ground that they are creditors of, or bona fide purchasers from the grantor, or are holders under such purchasers or have authority from them." 18 C. J. 244.

It does not appear that there was any contract between defendant in error and Goodwin except the escrow agreement. He was not, under the authorities, a purchaser, and had no right, therefore, to question the title of plaintiff in error. She, having acquired title in accordance with the contract, which she had fully performed, was entitled, under her cross-complaint, to have title quieted in her. In any event, the plaintiff, not having been in possession of the land, could not maintain the suit.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

On Application for Rehearing.

Application for Rehearing stricken from the files for violation of Rule 47. Rehearing Denied.

PER CURIAM:

The application for a rehearing in this case covers over twenty pages, containing citations from opinions, recital of evidence, and argument against the conclusions announced by this court. It violates the rule promulgated in December last, which prohibits reargument on application for rehearing.

The application is stricken from the files under said rule, and that action is taken the more readily because we find in the argument nothing new, or which in any way calls for a rehearing.

It appears that there has been, on the part of some members of the bar, a misunderstanding of this rule. It is, in substance, the same as the rule which has been in effect in Illinois for many years. In adopting the rule we subscribed to the statement made by the Illinois court in *Chicago City Ry. Co. v. O'Donnell*, 208 Ill. at page 281, 70 N. E. 477, where it is said:

"A rehearing may be had in this court when any material fact has been overlooked or misapprehended or where the court has failed to determine some proposition of law that is of controlling importance in the cause, and the only legitimate office of the petition for rehearing is to show, by a terse and accurate statement, the court's inadvertence, with reference to such portions of the brief or abstract as will sustain petitioner's position. * * * Helpful arguments, both oral and printed, are welcomed by this court. It is our earnest desire that a litigant should avail himself to the fullest extent of his right to argue, orally and otherwise, his cause in this forum. The proper time to argue, however, is at the time of submission, and when a case has been fully argued, has received careful consideration and been decided, a reargument in a petition for a rehearing can serve no useful purpose. All that is proper in that respect is a reference to that portion of the brief and argument which petitioner conceives will show the error of the court."

This rule does not, as some have supposed, prohibit the citation of authorities, or a reference to those cited in the

briefs; but it does aim to prevent the reargument of questions on which the court has passed. To refer the court to a specific matter, deemed necessary for consideration, is much more likely to produce the desired result than is an extended reargument in which such matter is included.

As has been pointed out in another Illinois case, the allowance of reargument on application for rehearing tends to induce less thorough argument in the first instance, and less consideration on the part of the court.

No. 10,312.

PHARES *v.* DON CARLOS.

Decided June 5, 1922. Rehearing denied July 3, 1922.

Action to remove cloud on title to real estate. Judgment for plaintiff.

Reversed.

On Application for Supersedeas.

1. **REAL PROPERTY—Contract Construed.** Property was sold under a trust deed and the debtor permitted to redeem by making certain payments within a limited time, which was later extended for twenty days. He made but one payment of \$5000. *Held*, that the contract for redemption was equivalent to an option to buy real estate; that when a payment was made under it and an extension of time given on the balance, it became a contract of sale, and that time was of the essence of the option and contract as extended.
2. **CONTRACT—Forfeiture.** Forfeitures are not favored and will only be enforced when the strict letter of the contract so requires.
3. **EQUITY—Forfeiture.** Equity will not enforce a forfeiture.

4. **PLEADING—*Superfluous Stricken*.** After complaint, answer and reply, defendant filed what he denominated a "Further Answer and Replication." *Held*, that this pleading was superfluous and should have been stricken.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. JOHN D. MILLIKEN, for plaintiff in error.

Mr. EDWARD L. SHANNON, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error is hereinafter referred to as "defendant" and defendant in error as "plaintiff."

Defendant having defaulted on an indebtedness due plaintiff, property conveyed by trust deed to secure payment was sold for \$22,498.71, the full amount thereof. Thereafter by writing (Exhibit "A") between the parties defendant was "permitted" to redeem for \$20,000.00 and have his notes cancelled and returned, provided payment was made on or before March 1, 1920. On defendant's request for additional time, and on payment in cash of one-fourth of the \$20,000.00 and agreement to pay \$100.00 as a "bonus," the contract was extended to March 20, 1920, as to the remaining \$15,000.00. This extension was made through an agent whose authority was by telegram reading, "Time is of the essence." Defendant recorded Exhibit "A" with receipt for said \$5000.00 attached, and having defaulted under the extension this action was begun April 6, 1921, to remove the cloud on plaintiff's title caused by said record. Judgment was for plaintiff, and defendant, having been denied any relief, prosecutes this writ. He claims an interest in the property to the extent of his payment and asks the issuance of a supersedeas.

Exhibit "A" conferred upon defendant a privilege but imposed no obligation. It was a mere option. It dealt with a certificate of redemption and certain evidences of in-

debtedness, but only as these related to the title to real property. It was, therefore, equivalent to an option to buy real estate. When defendant made a payment under it and purchased an extension of time on the balance it became a contract of sale.

The option was conditioned upon payment on or before a day certain. Extension agreements as to time are evidence that the parties regard time as material. If they did not here, defendant had a reasonable time after March 1, to exercise his privilege. Twenty days was reasonable. He would not pay \$100.00 for what he already had. Hence, irrespective of the telegram and the authority of the agent, time was of the essence of the option and the contract as extended. Plaintiff contends that in such case payments made prior to default are forfeited. Exhibit "A" contains no forfeiture clause. Forfeitures are not favored and will only be enforced when the strict letter of the contract so requires. *Finley v. School Dist. No. 1*, 51 Mont. 411, 153 Pac. 1010, 1012.

This is an action in equity and the general rule is that equity will not enforce a forfeiture. *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363. If plaintiff is made whole he can, in equity, demand nothing more.

Voluminous briefs are filed herein and both parties request a final decision. Plaintiff cites numerous authorities on the theory that defendant's position is the same as in an action at law by him to recover payments made on a defaulted contract. Defendant counters with authorities on the theory that time was not of the essence and that he had not defaulted. None of these cases are of material assistance and none require examination here.

After complaint, answer and reply, defendant filed what he denominates a "Further Answer and Replication." It is superfluous and should be stricken.

Defendant has never paid the \$100.00 "bonus" for the extension which he actually obtained. This he must do. He must also pay damages, if any, occasioned by his default. To that end the pleadings may be amended as the

parties are advised. Plaintiff must return the \$5000.00 paid, less "bonus" and damages, if any, and the cloud should be removed.

The judgment is reversed and the cause remanded for further proceedings in conformity herewith.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,322.

HAMMITT, ET AL. v. PORTER, ET AL.

Decided June 5, 1922. Motion to modify opinion denied July 3, 1922.

Action on judgment of a foreign state. Judgment for plaintiffs.

Reversed.

On Application for Supersedeas.

1. **EVIDENCE—Court Records—Authentication.** An exemplified copy of a journal entry of a foreign state court is inadmissible in evidence in the courts of this state where the certificate of the judge omits the statement that the clerk's certificate is in due form, in compliance with section 393, code of 1908.
2. **Judgment Roll.** In an action on a judgment of a foreign state an exemplified copy of the judgment, to be admissible in evidence, should be accompanied by the judgment roll, i. e., the record proper up to the judgment.
3. **PLEADING—Failure to Reply—Admission.** Pleadings reviewed and held, that the allegation in the answer of want of service or appearance, was a plea in confession and avoidance, and was admitted by failure to reply.

Error to the County Court of Kiowa County, Hon. W. V. McMullen, Judge.

Mr. JAMES T. LOCKE, for plaintiffs in error.

Mr. R. C. POSTLETHWAITE, Mr. W. M. GLENN, for defendants in error.

Department Two.

MR. JUSTICE DENISON delivered the opinion of the court.

THE defendants in error recovered judgment in the county court of Kiowa county, against plaintiffs in error upon a judgment of the district court of Greeley county, Kansas.

At the trial the plaintiffs offered in evidence an exemplified copy of the journal entry of the Kansas judgment. The defendants objected to the copy on the ground: First, that it was not certified and attested according to law, especially that the certificate of the judge did not state that the attestation was in due form; second, that it was not accompanied by the judgment roll; third, that the complaint and other pleadings showed the court to have been without jurisdiction of the person of the defendants. The objections were overruled.

The certificate of the judge omits the statement that the clerk's certificate is in due form. When plaintiffs rested, the defendants moved for judgment but offered no evidence and the court rendered judgment for the plaintiffs.

In this court, on motion for supersedeas, the plaintiffs in error make the three objections noted above.

Upon the first and second points the authorities are with plaintiffs in error. The requirement of U. S. Rev. Stat. 1878, § 905, followed by the Colorado Code 1908, § 393, is for a certificate of the judge that the clerk's certificate is in due form. *Craig v. Brown*, 6 Fed. Cas. No. 3,328; *Chapman v. Chapman*, 74 Neb. 388, 104 N. W. 880, and other cases cited in 22 C. J. 846. And it is necessary that the judgment roll, i. e. the record proper up to the judgment, should be presented with the judgment itself. *McLaughlin*

v. Reichenbach, 52 Colo. 437, 438, 122 Pac. 47; 22 C. J. 815.

Upon the third point also plaintiffs in error are right. In the amendment to the complaint plaintiffs alleged the appearance of defendants below by attorney. Defendants answered alleging want of jurisdiction over their persons, lack of service and of appearance, which were undenied by replication.

The allegation in the complaint of appearance by defendants in the Kansas case was unnecessary, (Code 1908 § 71), and anticipated the defense of want of jurisdiction and, so was a nullity. *Brooks v. Bates*, 7 Colo. 576, 4 Pac. 1069; *Swanson Theater Co. v. Pueblo Opera Block Inv. Co.*, 70 Colo. 83, 197 Pac. 762; *Canfield v. Tobias*, 21 Cal. 349; *Bulova v. Barnett*, 181 N. Y. Supp. 247.

The allegation in the answer of want of service or appearance was a plea in confession and avoidance and was admitted by failure to reply. Though this allegation was a negation of allegations in the complaint, yet because those allegations were in anticipation of the defense they must be disregarded.

We deem it just to reverse this case now, because, if their evidence is procurable it will hasten plaintiff's final judgment, if not it can harm neither party.

Supersedeas denied; judgment reversed and cause remanded.

MR. JUSTICE TELLER, sitting for MR. CHIEF JUSTICE SCOTT and MR. JUSTICE WHITFORD concur.

No. 9858.

**CROKE v. FARMERS HIGHLINE CANAL & RESERVOIR CO.,
ET AL.**

Decided March 6, 1922. No change in opinion on rehearing, July 3, 1922.

Action to quiet title to water right. Judgment for defendants.

Reversed.

1. **WATER RIGHTS—*Quieting Title—Mandamus.*** A perpetual water right may not be secured, nor title thereto quieted in an action in mandamus.
2. **RES ADJUDICATA—*Different Character of Action.*** A question having been once litigated and determined may not again be contested in a future action between the same parties merely because the action is of a different character.

If the matter in question is controverted by the pleadings, it will be conclusively presumed to have been litigated.

3. **CORPORATIONS—*Share-Holders—Judgments.*** There is a privity between a corporation and its share-holders, and a decree against the former is conclusive upon the latter in respect to their rights as such.

Error to the District Court of the City and County of Denver, Hon. Julian H. Moore, Judge.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. R. F. ARMSTRONG, for plaintiff in error.

Messrs. BARTELS & BLOOD, Mr. EDWARD D. UPHAM, for defendants in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

PLAINTIFF in error was plaintiff, defendant in error, The

Farmers High Line Canal and Reservoir Company, was defendant, and the other defendants in error were interveners in the trial court, and they are hereinafter so referred to.

Plaintiff owned a water right of seventy-five statutory inches in a certain irrigation canal which was purchased by defendant upon its organization. This water, and the land to which it was appurtenant, he conveyed by three successive deeds of trust. The last of these was foreclosed, the property passed through numerous hands and finally returned to him, and he thereafter discharged the unpaid balance on the other securities. Meanwhile, under a reorganization scheme, seven and one-half shares of stock were issued by the defendant in lieu of said water right of seventy-five inches. This stock never came into the hands of plaintiff, but from the date of its issue was represented by stock certificates which became merged and inter-mixed with other certificates and shares of stock whose owners had no personal knowledge of the claims of plaintiff.

In 1907 plaintiff brought mandamus against defendant to compel the delivery to him of the water represented by his water right. In that suit he prevailed. In 1908, the company having again refused to deliver the water, a similar suit was brought in which plaintiff again prevailed. Thereafter the disputed water was delivered to plaintiff each year until the present action was begun in July, 1912. Plaintiff alleges in this complaint that he is the owner in fee simple of the water right and asks that title thereto be quieted in him. Defendant filed its answer and cross-complaint August 29, 1918. February 25, 1919, interveners (stockholders in defendant company) filed their petition. June 12, 1919, plaintiff filed his amended replication and answer to the cross-complaint and to the petition in intervention, in which he set out the mandamus suits and pleaded *res adjudicata*. June 23, interveners and defendant demurred to this replication and answer, which demurrers were sustained. Other pleadings were filed and rulings made thereon by the court not now necessary to

notice. Ancient as this action would seem to appear we might note in passing that it was not brought to issue in this court until the first of December 1921, and that it was orally argued here January 11, 1922.

The defense set up in both mandamus suits was that the heirs of Church (grantee of the purchaser at the foreclosure sale above mentioned) had by contract conveyed the water to the defendant in consideration of the issuance of the seven and one-half shares of stock. The same contention is made here by all of the defendants in error and the question of *res adjudicata*, raised by the demurrers to the amended replication and answer, and decided adversely to plaintiff by the trial court's ruling thereon, is now before us and must first be determined.

BURKE, J., after stating the facts as above.

It is not denied that the defense here relied upon was set up in the mandamus suits but it is now contended that, being equitable in its nature, it could not have been determined therein, and *Bright v. Farmers' H. C. & R. Co. et al.*, 3 Colo. App. 170, 32 Pac. 433, and *Townsend v. Fulton Irr. Ditch Co.*, 17 Colo. 142, 29 Pac. 453, are relied upon to support this contention.

It is certainly true that a perpetual water right may not be secured, or title thereto quieted, in an action in mandamus. In such actions as those of 1907 and 1908, *supra*, the right to delivery depends upon tender of the annual charge, but the question having been once litigated and determined may not again be contested in a future action by the same parties merely because the action is of a different character. The mere fact that temporary relief only could be granted in a given cause would not prevent the settlement therein, for all purposes between the same parties, of a given issue there determined. In all future actions between the same parties involving that issue the prior judgment would thus far be a perfect defense as *res adjudicata*.

We pass by the fact that the opinion in the *Bright* case, *supra*, makes no reference to section 59 chapter 4, Civil

Code (Sec. 65 Civil Code R. S. 1908) and that the defense interposed in that case was one which under no circumstances could be entertained except by converting the mandamus action into one to quiet title; and the further fact that defendants' contention that the defense in the mandamus suits was equitable, not legal, seems unsupported, and go to the only question apparently necessary to a decision of this case.

Questions once litigated and determined may not be raised by the same parties in a subsequent action.

"If the matter in question is controverted by the pleadings it will be conclusively presumed to have been litigated." *Bijou Irr. Dist. v. Weldon Valley Ditch Co. et al.*, 67 Colo. 336, 341, 184 Pac. 382.

If the defense set up in the mandamus cases could not be considered it should not have been pleaded. Having been pleaded and not stricken we must presume it was considered and determined. This being true defendant's relief in the mandamus suits was by appeal or error. Having failed to obtain such relief the judgments stand and the question is foreclosed.

If defendant can not re-litigate the question here neither can the interveners. There is a privity between a corporation and its share holders, and a decree against the former is conclusive upon the latter in respect to their rights as such. 2 Black on Judgments sec. 583. *Andrews v. Natl. F. & P. Works*, 76 Fed. 166, 172, 22 C. C. A. 110, 36 L. R. A. 139.

The judgment is accordingly reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE BAILEY not participating.

No. 10,041.

MCLEOD v. THE COLORADO POWER COMPANY, ET AL.

Decided July 3, 1922.

Action to quiet title. Judgment for defendants.

Affirmed.

1. **WORDS AND PHRASES—“Construct.”** Where by contract a party was granted certain rights in connection with reservoirs which might thereafter be constructed, and at the time of the execution of the contract only surveys and filings had been made with no actual construction of reservoirs, it is held that the word “construct” should not be construed as in cases involving priorities of water rights where the right attaches at the date of beginning work, but should be given its usual and ordinary meaning.
2. **CONTRACT—Construed.** Where a license is granted by contract, conditioned that it is not to restrict or interfere with the use of the property by first party, its successors or assigns, the condition is in favor of the grantor, to be construed as a protection to subsequent owners of the property, and not a perpetual privilege to the grantee, binding upon succeeding owners.
3. **Construction.** Contract construed and held not to contain any words of grant in the premises affected as a “license” only was given for the purposes named.
4. **Designation—Construction.** While the designation of an instrument does not determine its character, it may be considered as indicating the intent of the parties.
5. **Construction.** Where the words of a contract are unambiguous, there is no room for construction.
6. **Construed.** An instrument granting boating, fishing and resort privileges in connection with reservoirs *to be* constructed, held not intended to take effect except upon the condition named, not a covenant running with the land, and not binding upon the successors of the granting party. Further held to have no connection with the title of the property, and containing no suggestion to a purchaser that he would be expected to comply with its provisions.

Error to the District Court of the City and County of Denver, Honorable Francis E. Bouck, Judge.

Messrs. PITKIN & MOORE, for plaintiff in error.

Mr. WILLIAM V. HODGES, Mr. D. EDGAR WILSON, Mr. ROGER H. WOLCOTT, for defendants in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

THE plaintiff in error brought suit against the various defendants in error to quiet his title to certain rights alleged to have been secured to him by contract between him and The Electric and Hydraulic Company, which was named in said contract as party of the first part. The court found for the defendants, and the plaintiff brings error.

After several transfers the reservoir sites and adjoining lands were acquired by the defendant in error, The Colorado Power Company. The other defendants in error are licensees of that company.

The parts of the contract material to be considered read as follows:

"That the party of the first part, in consideration of one dollar (\$1), and other valuable considerations, receipt whereof from the party of the second part is acknowledged, has given and by these presents does give to the party of the second part and his assigns, the exclusive license to use the reservoirs which the party of the first part may hereafter construct upon Middle Boulder Creek or its tributaries, in said County of Boulder, State of Colorado, and the lands adjoining same above the high water lines of such reservoirs, owned by the party of the first part; except the Kossler reservoir and lands owned by the party of the first part adjoining the same; for boating, fishing and resort purposes; and to construct and remove buildings upon such lands above the high-water lines of said reservoirs, except said Kossler reservoir; not, however, in any such way as

to restrict or interfere with the use of any of said reservoirs or lands by the party of the first part, its successors and assigns, for the storage and drawing off of water for power, irrigation or other purposes, or otherwise, to such extent and to such levels as the party of the first part may from time to time determine or change and subject to such regulations as the party of the first part, its successors or assigns or its officers may impose, in order to insure the safety of the said reservoirs, and any dams or other works constructed in connection therewith, and the use, maintenance, repair, replacement and operation thereof."

It is to be observed that the contract provides that the plaintiff in error should have certain rights above the high water line of "reservoirs which the party of the first part may hereafter construct on Middle Boulder Creek."

The defendant in error's contention is that inasmuch as The Electric and Hydraulic Company constructed no reservoirs, there was nothing upon which the privilege could operate.

Plaintiff in error contends, however, that, inasmuch as surveys and filings had been made for the reservoirs prior to the date of the contract in question, the reservoirs may be regarded as constructed by The Electric and Hydraulic Company.

This is to give to the word "construct" in the contract the meaning which is applied to it in cases which involve priorities to water rights, and in which the right attaches at the date of the beginning of the work on the irrigation system. It is not the usual meaning of "construct," and we see no reason for giving it to the word as used in the contract.

Plaintiff in error also contends that where the contract provides that the privilege granted is not to "restrict or interfere with the use of any of said reservoirs or lands by the party of the first part, its successors or assigns," it indicates that the privilege is to extend to the land when owned by such "successors and assigns." This is not the natural meaning. This restriction is in favor of the party

of the first part, and intended for its protection. The reference to successors and assigns is clearly intended to extend the protection to subsequent owners of the property.

The same may be said of the use of those words in other places in the contract. They indicate no purpose to benefit the party of the second part by making the contract binding upon succeeding owners of the property.

Plaintiff in error contends that under the testimony given by McLeod as to the circumstances under which the contract was performed, it must be presumed that McLeod obtained an easement. The claim is that "the grant of rights to McLeod was made in fee." We find no words of grant in the contract. On the contrary the first party gives to him and his assigns "the exclusive *license* to use the reservoirs" for the purposes named. It is true that the designation of an instrument does not determine its character, but such designation may be considered as indicating the intent of the parties.

The rule is that where the words of a contract are unambiguous, there is no room for construction. If there be ambiguity, resort may be had to the circumstances under which the agreement was made to determine the proper construction of the ambiguous terms. The contract, which refers to the land yet to be acquired, is a simple contract, unilateral in character, which binds the party of the first part to permit McLeod, or his assigns, to exercise certain privileges upon the reservoirs thereafter to be constructed, and upon the land bordering thereon, "owned" by the party of the first part. Whether this instrument is a license, or a grant of an easement, need not be determined. Whatever it is, it relates only to reservoirs constructed by the party of the first part, and lands owned by it. There is nothing in the instrument to show that it was intended to take effect except upon the conditions named; nor does it appear that it is in any sense a covenant running with the land, so as to be binding upon grantees of the party of the first part.

It is a contract having no connection with the title to the

property, and containing nothing to suggest to a purchaser that he would be expected to comply with its provisions.

Plaintiff in error seeks not to have the court construe ambiguous language in the contract, but rather to add to it something which, it is claimed, the parties, or at least one of them, had in mind when the agreement was made. That is not the province of a court. Whatever the parties intended, they did not include in the contract anything which would give to purchasers notice of any interest claimed by plaintiff in error, either by way of license or easement.

We are, therefore, of the opinion that the trial court was right in finding for the defendants, and the judgment is accordingly affirmed.

MR. CHIEF JUSTICE SCOTT, MR. JUSTICE DENISON and MR. JUSTICE CAMPBELL not participating.

No. 10,055.

BOARD OF COMMISSIONERS OF WASHINGTON COUNTY *v.*
MURRAY.

Decided July 3, 1922.

Action to recover taxes paid under protest. Judgment for plaintiff.

Affirmed.

1. CONSTITUTIONAL LAW—*Taxation—Real Estate Mortgages.* Section 5542, R. S. 1908, concerning assessment of real estate mortgages, is not unconstitutional as exempting property from taxation. Taxing real estate and a mortgage on the property, separately, constitutes a double taxation, and the statute providing they shall be assessed as a unit, and that the notes and mortgage shall not

be otherwise returned or assessed, does not exempt the mortgage from taxation.

2. **BANKS AND BANKING—Assessment and Taxation.** A bank should be taxed on its taxable assets with such deductions as the law allows.

Error to the District Court of Washington County, Hon. L. C. Stephenson, Judge.

Mr. ISAAC PELTON, for plaintiff in error.

Mr. A. J. BRYANT, Mr. J. M. TAYLOR, for defendant in error.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

MURRAY is engaged in banking under the name of the Bank of Akron. The bank is not a corporation and is owned by Murray alone. He brought suit to recover taxes paid under protest for the years 1917, 1918 and recovered the sum of \$3,076.29. The county brings error.

He returned his tax schedule and the assessor under the statute added thereto for each year the amount of mortgage loans held by the bank. In the year 1918 that amount was \$23,000. The court held that these loans were not taxable; hence the judgment for the plaintiff.

The Colorado Constitution provides: (article 10, section 3) "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal; Provided, * * *." Here follow certain exemptions not including mortgages or mortgage debts.

Article 10, section 6: "All laws exempting from taxation, property other than that hereinbefore mentioned shall be void."

The statute concerning assessment of mortgages is as follows:

“* * * Provided, that where any property within this state is mortgaged, conveyed or pledged for the security of a loan or debt then owing, the said property and the notes, mortgage, deed of trust, trust deed, contract or other conveyance, shall be assessed as a unit, and as one and the same, and as of one value and as the value of said property so mortgaged, pledged or otherwise conveyed only, and any such notes, mortgages, deeds of trust, trust deeds, contracts or conveyance, shall not be otherwise returned or assessed.” R. S. 1908, Sec. 5542.

It is claimed by the plaintiff in error that this statute amounts to an exemption of mortgages from taxation and is therefore in violation of said § 6. He says mortgages are property and that under article 10 section 3, all property must be taxed, and he calls attention to the statute, § 5543, R. S. 1908, “All property not expressly exempt by law shall be subject to taxation,” and to the fact that the statutes make money, notes and credits taxable and that a mortgage is neither more nor less than a secured note or credit.

If all this is true of course the act is unconstitutional, whether it exempts directly or indirectly. *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097; *Huntington v. Worthen*, 120 U. S. 97, 7 Sup. Ct. 469, 30 L. Ed. 588. Does it exempt the mortgage from taxation? If the direct taxation of the mortgage would be double taxation, an act the effect of which would be to relieve it from such direct taxation would not be a “law exempting” it, because it would still be taxed though not doubly. That such tax is, in a sense, double, is obvious, and it has been so held and stated in some cases. See *People v. Worthington*, 21 Ill. 171, 177, 74 Am. Dec. 86, where, admitting that such tax is double, the court holds it constitutional. It is obviously double, because without creating any more actual property the combined taxation of the property of the two persons, mortgagor and mortgagee, is greater by the amount of the mortgage loan than it was before that loan was made. *State v. Smith*, 158 Ind. 543, 63 N. E. 25; same on rehearing, 158 Ind. 575, 64 N. E. 18, 63 L. R. A. 116. The same

parties, therefore, are made to pay more tax on the same property merely because a part of it has changed from one to the other with an obligation to return it. See *People v. Hibernia S. & L. Society*, 51 Cal. 243, 21 Am. Rep. 704.

Further, the legislature has power to classify the Mortgage as real estate. *Grand Lodge v. Sarpy County*, 99 Neb. 647, 157 N. W. 344; *Savings Society v. Multnomah County*, 169 U. S. 421, 424-425, 18 Sup. Ct. 392, 42 L. Ed. 803. And, they having so classified it, and having provided for its taxation as real estate, how can we say that they meant to exempt it and then proceed to hold their action unconstitutional? There is really more ground for saying that the land is exempted *pro tanto*, to the amount of the mortgage; but such argument is answered by what we have said above of double taxation. It is a deduction rather than an exemption, (Cooley Taxation, 174; *State v. Smith, supra*) and wholly in favor of the borrower because he must, as shown below, in the last analysis, always pay the tax. These considerations force us to the conclusion that the statute does not exempt the mortgage from taxation.

To look at the matter somewhat further: The decisions are greatly at variance. The supreme court of Illinois in the above case held that the taxation of a mortgage was constitutional because the legislature had power to tax doubly. The supreme court of Utah held that such an act was constitutional because it was not double taxation and that it was not double because the mortgage was property distinct from the land. *Judge v. Spencer, supra*. But Nebraska held that an act was valid which provided that the mortgage should be assessed to the mortgagee as real estate, and deducted from the value of the land, which should be assessed to the mortgagor, (*Grand Lodge v. Sarpy County, supra*) thus, of course, as effectually exempting the mortgage or a part of the land as does our statute. In this last mentioned case the court held that the legislature had unquestioned power to classify a mortgage as real estate even though, since it could no longer be called a credit, the owner was thereby deprived of the right to de-

duct his debts from the assessed valuation thereof, and that he must pay taxes thereon even though he owed debts equal to or exceeding its amount. So in Massachusetts some mortgages are by statute classed as real estate and some as personal property. So we may say that our legislature has classified the mortgage as real estate, as has Nebraska, but has provided that it be assessed to the mortgagor instead of the mortgagee, which is not a substantial difference, because, since the lender cannot be compelled to lend and will lend only at the market rate, he will, directly or indirectly, compel the borrower to pay the tax on the mortgage.

The legislature is required by the constitution, above quoted, to "prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." It is not for us to question the wisdom of the legislature, but, if we could, is it not just to relieve the mortgagor of the burden of the tax on both land and mortgage debt? Is it not more just than to make him pay it? The answer must be yes. Then can we say that the legislature, commanded by the constitution to secure a just valuation of all property for taxation, cannot constitutionally do this just thing? The Indiana constitution in this respect, is much like ours. *State v. Smith, supra.*

We gather from the record and briefs that our opinion in *Murray v. Washington County*, 67 Colo. 14, 185 Pac. 262, has not been fully understood. A bank, like other persons, should be taxed on its taxable assets, not its liabilities, with such deductions as the law allows. See the ordinary statement of the condition of any bank; *Planters' Bank v. Union Bank*, 16 Wallace, 484, 21 L. Ed. 473; *Morse on Banks & Banking*, 3rd Ed., § 289; *State v. Carson City Savings Bank*, 17 Nev. 146, 30 Pac. 703. See also *Loan Association v. Keith*, 153 Ill. 609, 622, 623, 39 N. E. 1072, 28 L. R. A. 65, and *Farmers Bank v. Minnesota*, 232 U. S. 516, 531, 34 Sup. Ct. 354, 58 L. Ed. 706. It is immaterial whether Murray had invested his capital or other funds in mortgages.

The following are a few of the cases on the subject

which, in addition to those cited above, in varying degrees support our conclusions:

First Trust Co. of Lincoln v. Lancaster County, 93 Neb. 792, 141 N. W. 1037, 1038; *Adams v. Mortgage Co.*, 82 Miss. 263, 397, 34 South. 530, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633; *Hawkrigde v. Treasurer & Receiver General*, 223 Mass. 134, 111 N. E. 707, 708; *Worcester v. Boston*, 179 Mass. 41, 49, 60 N. E. 410; *Crawford v. Linn Co.*, 11 Or. 482, 5 Pac. 738; *Firemen's Ins. Co. v. Commonwealth*, 137 Mass. 80, 81; *Knight v. City of Boston*, 159 Mass. 551, 35 N. E. 86; *Common Council v. Board of Assessors*, 91 Mich. 78, 92, 51 N. W. 787, 16 L. R. A. 59; *State v. Hinkel*, 139 Wis. 41, 119 N. W. 815; *Sweetser v. Manning*, 200 Mass. 378, 86 N. E. 897; *Citizens' S. & T. Co. v. School Sisters*, 151 Wis. 619, 139 N. W. 439, 440, 441; *State v. Ala. Fuel & Iron Co.*, 188 Ala. 487, 66 South. 169, L. R. A. 1915A, 185, Ann. Cas. 1916E, 752; *Mutual B. & L. Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *State v. Farmers' Savings Bank*, 114 Minn. 95, 130 N. W. 445, 851; *Orr v. Sutton*, 119 Minn. 193, 137 N. W. 973, 42 L. R. A. (N. S.) 146; *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122; *Trustees' Ins. Co. v. Hooton*, 53 Okl. 530, 157 Pac. 293, L. R. A. 1916E, 602; *Pocahontas Collieries Co. v. Com.*, 113 Va. 108, 73 S. E. 446; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *People v. Gass*, 206 N. Y. 609, 100 N. E. 404; *Economy Power Co. v. Daskam*, 174 Mich. 402, 140 N. W. 466; *People v. Trust Co.*, 208 N. Y. 463, 102 N. E. 578; *State v. Runyon*, 41 N. J. Law, 98; *State v. Darcy*, 51 N. J. Law, 140, 145, 16 Atl. 160, 2 L. R. A. 350; *Goldgart v. People*, 106 Ill. 25.

Judgment affirmed.

MR. JUSTICE TELLER sitting as Chief Justice.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,069.

HENRIE, ET AL. v. GREENLEES, ET AL.

Decided July 3, 1922.

Action in ejectment. Judgment for plaintiffs.

Reversed.

1. **TAXES AND TAXATION—Deed Application for—Notice.** Under the provisions of section 5727, R. S. 1908, it is not necessary to publish notice of application for a tax deed, where all interested parties have been served with actual notice thereof.
2. **CORPORATIONS—Notice.** Notice to corporate officers or agents within the scope of their authority, is notice to the corporation.
3. **STATUTES—Interpretation—"Or"—"And."** In the interpretation of a statute, courts may, in order to carry out the intention of the legislature, substitute "and" for "or."
4. **TAXES AND TAXATION—Sale—Purchase by County—Deed.** A tax deed which shows on its face that the property was bid in by the county the first day it was exposed for sale, may be held void, but the facts do not make the rule applicable to the case under consideration.
5. **Sale—Payment of Subsequent Taxes.** Under section 5726, R. S. 1908, the purchaser of a tax sale certificate from the county is required to pay the taxes assessed since the date of the sale, or such sum as the commissioners may decide. Held, that there was a compliance with this requirement where the holder of such a certificate purchased the tax sale certificates thereafter issued on the property.
6. **FRAUD—Not Established.** On review of the record, it is held not to warrant the conclusion that defendant was guilty of any fraud or conspiracy in the transaction under consideration.

*Error to the District Court of Hinsdale County, Hon.
Thomas J. Black, Judge.*

Messrs. MOYNIHAN, HUGHES, KNOUS & FAUBER, for plaintiffs in error.

Mr. HARRY C. RIDDLE, Mr. RICHARD F. RYAN, for defendants in error.

Mr. BOSWELL F. REED, Mr. ROBERT W. STEELE, JR.,
Amici Curiae.

En banc.

MR. JUSTICE ALLEN delivered the opinion of the court.

THIS is a suit in ejectment and was instituted by a stockholder of The Sunflower Mining Company, a corporation, for himself and others similarly situated and on behalf of the corporation, to recover the possession of certain lode mining claims situated in Hinsdale County, Colorado, and also to recover damages for an alleged severance and conversion of mining fixtures. The complaint charges that the defendants "conspired together for the purpose of defrauding the company and obtaining possession of said mining claims and did wrongfully oust the said company through such conspiracy."

An answer was filed by three of the defendants. They allege that one of them, Florida Bryson Henrie, obtained a tax deed to the property, and that the other two answering defendants are each her grantee as to one third interest in the property. The answer sets up various matters leading up to the issuance of the tax deed.

The replication charges conspiracy between the defendant Florida Bryson Henrie and certain officers of the company in connection with the procuring of the tax deed in question, and alleges other matters which raise several issues of fact material in the matter of the validity of the tax deed irrespective of the alleged conspiracy.

The trial court found the issue of conspiracy in favor of plaintiff, and also held the tax deed invalid upon several grounds. There was a judgment for plaintiff. The three answering defendants, being the holder of the tax deed and her grantees, bring the cause here for review.

The defendant Florida Bryson Henrie was the assignee of a certificate of purchase of the mining claims in question

at a tax sale, and as such assignee she thereafter duly made a request upon the county treasurer for a tax deed. The county treasurer published a notice of the application for tax deed in *The Silver World* and *Lake City Times*, a newspaper of Hinsdale County. It is claimed, and the trial court held, that this newspaper is not a legal newspaper within the meaning of section 3931, R. S. 1908, and that, therefore, the tax deed is void because the application for the same was not properly published as required, under certain circumstances, by section 5727, R. S. 1908.

Whether the newspaper in question was a legal newspaper is, however, immaterial in the instant case. A notice was served upon all interested parties, including the corporation above named, in whose name the property was taxed. A notice was sent to its agent at its home office in Phoenix, Arizona, and also to each member of its board of directors. The latter fact alone is sufficient to constitute a notice to the corporation. 7 R. C. L. p. 653. All interested parties having been served with actual notice, it does not seem reasonable that publication should be required, and, moreover, it is not necessary to construe the statute so as to require publication under these circumstances.

Section 5727, R. S. 1908, contains the following clause:

"If no person is in actual possession or occupancy of such land or lot, or the residence of the person in whose name the same was taxed * * *, and the residence of none of the persons having interests or title of record in or to the premises, can, upon diligent inquiry, be learned, then the treasurer shall publish such notice in some newspaper * * *."

The evident intent of the legislature was to require publication only in the event that actual notice cannot be given to the owner and to persons having an interest of record in the land. Such intent would be clearly expressed if the word "or" in the second line of the quotation above given had been changed to the word "and." But we may make the substitution now, and in so doing, use the following language taken from *Thomas v. Grand Junction*, 13 Colo. App. 80, 85, 56 Pac. 665, 667:

"It is obvious to us that to carry out the intent of the legislature in the enactment under consideration, such a substitution of 'and' for 'or' must be made in this case."

The above case cited quotes with approval from Endlich, Interpretation of Statutes, section 303, as follows:

"To carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and,' one for the other. (Indeed, these words are said to be convertible into each other, as the sense of the enactment and the necessity of harmonizing its provisions may require.)"

The plaintiff below contends that the tax deed shows on its face that the property was bid in by the county on the first day that it was exposed for sale. If this were true, the deed might be held void on its face, according to *Empire Ranch & C. Co. v. Neikirk*, 23 Colo. App. 392, 128 Pac. 468, cited by plaintiff. But such is not the case. The deed recites that the treasurer "did on the 23rd day of December, A. D. 1914, * * * at an adjourned sale, the sale begun and publicly held on the 21st day of December, A. D. 1914, expose to public sale," etc. This recital does not show that the property was bid in by the county on the first day the property was offered for sale, but it indicates the contrary, when taken in connection with the further recital that the sale was made in substantial conformity with the requirements of the statute in such cases made and provided. The recitals correspond to those found in the tax deed considered in *Imperial Securities Co. v. Morris*, 57 Colo. 194, 141 Pac. 1160, holding that the deed need not disclose the day on which the land was first offered. That case, which overrules *Bryant v. Miller*, 48 Colo. 192, 109 Pac. 959, on the point now being considered, is decisive of the instant case in this matter. The deed is not, therefore, void because of the recitals above mentioned, but is valid.

The trial court found that the taxes assessed since the date of the sale (December 23, 1914) were not paid by the purchaser either at or after the time of the making of

the assignment of the certificate of purchase, or at all. Under the circumstances shown by the record, the tax deed cannot be held invalid on this ground, since the court further found that on August 4, 1918 the defendant Florida Bryson Henrie purchased tax sale certificates from the County Commissioners of Hinsdale County for the taxes for the years 1913, 1914, 1915, 1916 and 1917. This was a compliance with section 5726, R. S. 1908, wherein it requires that the purchaser of a tax sale certificate from the county shall pay "the taxes assessed * * * since the date of" the sale or "for such sum as the board of county commissioners * * * may decide * * *."

We have examined the record also for the purpose of determining whether there is sufficient evidence of fraud and conspiracy to warrant a judgment for plaintiff on that ground, and find that there is not. If the officers of the company were guilty of any breach of trust in allowing the property to be sold for taxes, the record does not warrant the conclusion that the defendant Florida Bryson Henrie, who is not an officer of the company, secured from the county an assignment of the tax sale certificates as the result of any fraud or conspiracy in which she participated.

There is nothing in the record to support a judgment against the holders of the tax title. The judgment is reversed and the cause remanded with directions to dismiss the suit.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

No. 10,101.

BERLIN, ET AL. v. WAIT.

Decided July 3, 1922.

Action to cancel a warranty deed. Judgment for plaintiff.

Affirmed.

1. **DEED—Escrow—Delivery.** Where a deed is placed in escrow to be delivered on the happening of a certain event, with power reserved in the grantor to change its terms or recall the deed, there is no delivery, the document never being actually delivered, and withdrawn and destroyed.
2. **Cancellation—Proof.** To justify the cancellation of a deed on the ground that it was procured as the result of undue influence, threats and misrepresentations, the proof must be definite and clear, and the facts in support of the fraud established beyond a reasonable doubt.

Evidence reviewed and held sufficient under this rule.

3. **WITNESSES—Competency.** Record reviewed and held not to support the contention of plaintiffs in error that they were defending in a representative capacity as heirs, and that therefore defendant in error was an incompetent witness in her own behalf.
4. **FRAUD—Conveyance—Burden of Proof.** Where a deed was executed by one party to another, the conveyance being induced by misrepresentations of the grantee, between whom and the grantor confidential relations existed, it was incumbent on the former, in an action for the cancellation of the deed by the latter, to show the fairness of his conduct and dealings in the transaction, to the satisfaction of the court.
5. **DEED—Validity.** A grantee is not bound by a conveyance which was not what she supposed it to be, and which she did not intend to make, its execution being procured by undue influence.
6. **Fraud—Validity.** If an instrument was vitiated by frauds at the time of its execution, confession thereof by the one who perpetrated them, does not make it valid.

7. *Undue Influence—Evidence.* Evidence to the effect that a grantor at the time of the execution of a conveyance was mentally incapable of making a valid deed and wholly unacquainted with business affairs, is very potential in connection with the question of undue influence.

Error to the District Court of the City and County of Denver, Hon. Greeley W. Whitford, Judge.

Mr. ROBERT G. BOSWORTH, Messrs. PERSHING, NYE, FRY & TALLMADGE, for plaintiffs in error.

Mr. WILLIAM W. GARWOOD, Mr. OMAR E. GARWOOD, Mr. GEORGE OLIVER MARRS, for defendant in error.

En banc.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

THIS action was brought by Zelma A. Wait to set aside and have cancelled a warranty deed which she executed March 22, 1919, and delivered to George H. Berlin, the former husband of her deceased daughter, which deed the grantee placed on record. Plaintiff, a woman over sixty years of age, charges that while she was sick and in great mental anguish as the result of the death of her daughter, which occurred a few weeks before she executed this deed, and while she was not mentally competent to transact business, and because of her weakened physical and mental condition brought about by her sorrow and illness, the defendant, George H. Berlin, the grantee in the deed, who is a man of strong personality, had so insinuated himself into her confidence that she could not resist his importunities and in such circumstances made the deed in question, and as the result of fraudulent representations, undue influence and by divers threats, and not of her own free will.

The defendant answered, denying the charges. Leave was granted to the defendant's son, Edgar Berlin, to appear in the action by his next friend, the said George H. Berlin, and to protect his alleged rights in the property. The defendant and intervener denied the charges of the

complaint and each filed a counterclaim or cross-complaint asserting title in the premises as heir of Mrs. Berlin and asked to have such interests determined and the title quieted.

The trial was to the court without a jury. Findings of fact generally upon all the issues, were made in favor of the plaintiff and a decree was entered cancelling her deed and quieting title to the property in her. From that judgment and decree the defendant and intervener are here with this writ of error.

In the briefs of plaintiffs in error it is said that the case naturally divides itself into two parts or branches: first, that the plaintiff, by her escrow deeds delivered to one Wilson in 1915, vested title to the property in question in her daughter, Edna Berlin, and upon the death of the latter, without a will, by the statute of this State, the property passed one-half to her husband, the defendant, and the other half to the intervener, her son. In part two they say that the plaintiff, by her deed of March 22, 1919, to George H. Berlin, vested legal title in him in trust for the use and benefit of the intervener. It will be observed that these two parts or branches of the case are inconsistent. If the property was conveyed in 1915 by the plaintiff to her daughter as the result of the escrow deeds, Mrs. Wait had no title which she could convey in 1919 to George H. Berlin. If Mrs. Berlin got no title, defendant and intervener are not here as heirs, or in a representative capacity, and plaintiff had a title to convey to defendant.

There is testimony to the effect, and the court so found, that when plaintiff placed the deeds in escrow with Wilson, which defendant and intervener say named Mrs. Berlin as grantee, she did so with the understanding upon her part, as well as that of the escrow holder, that she might make changes in them, as she saw fit, and she subsequently did make one or more changes; and that she reserved the right to withdraw the deeds from escrow, although instructing the escrow holder to deliver them to her daughter after her death, if the daughter was then living. That being true,

it sufficiently appears that the intervener and the defendant, as heirs of Mrs. Berlin, took nothing by these escrow deeds, for they were never delivered to the grantee and the same were withdrawn and destroyed before the death of the latter. While counsel for the plaintiffs in error make the contention that these escrow deeds were valid and title thereby was vested in the grantee, Mrs. Berlin, we can not disturb the finding of the trial court that the deeds were never delivered. 13 Cyc. 569, *et seq.*; *Childers v. Baird*, 59 Colo. 382, 148 Pac. 854.

The property, therefore, belonged to the plaintiff and her title was recognized by the defendant, and the property so remained the property of the plaintiff at the time that she executed the deed of March 22, 1919. The only issue of fact, therefore, is whether or not this deed was procured as the result of the alleged undue influence, threats and fraudulent representations by the grantee, Berlin.

We assume with the plaintiffs in error that to justify the cancelling of a deed the proof that it was procured by such improper motives must be definite and clear, and as one of our own decisions says, the facts in support of a claim to set aside a deed must be proved beyond a reasonable doubt. *Martinez v. Martinez*, 57 Colo. 292, 298, 141 Pac. 469. The trial court who heard this case and saw the witnesses as they testified, found that the evidence was of the character required by our decisions. The testimony is practically undisputed that at the time of the conveyance in question, which was about two months after the death of plaintiff's daughter, she, the plaintiff, was greatly depressed mentally, was suffering from gall stones and Bright's disease, and was in a weakened bodily condition, as well unsettled in her mental state. While it is true that these facts alone would not prevent her from giving a valid deed, they are circumstances of weight in determining whether or not undue influence was exercised upon her, and her will thereby overcome.

Plaintiff testified that the defendant is a man of strong and forceful personality. She had implicit trust and con-

fidence in him, and at the time of the conveyance was living with him, assisting in the care of his family, including her own grandson and two children of the defendant by a former marriage. The relation between them was one of confidence, and plaintiff at the time believed to be true all the representations made to her by the defendant. He told her that her title to the property was not good to the extent which she claimed, and, at best, she had title only to an undivided one-half, the other half being in the defendant and his minor son as the sole heirs of his deceased wife. He also told her that an effort was being made by relatives of her deceased husband to get this property from her, and that unless she made the deed in question to him, and as he wanted it, he would hold her liable for the value of the use and enjoyment of the premises which she claimed under her husband's deed, and that she would be deprived of this property by these relatives. He further told her that unless she made this conveyance, he would not permit her to visit her grandson or have access to him. She was devoted to her grandson, and, as the result of all these importunities and persuasions on the part of the defendant, she testified that her free will was overcome and that she made the conveyance as the result of the undue influences, false representations and threats of the defendant. It is true that the defendant denies these charges and says that his only object in procuring the conveyance to himself was for the benefit of his son, which was also the desire of the plaintiff. The court, however, evidently believed the testimony of the plaintiff and her witnesses. Several of them testified that, after this conveyance had been made by the plaintiff to the defendant, the latter told them that he had "put one over on the old lady," (referring to the plaintiff), and that he had blocked the scheme of her husband's relatives, which was to acquire ownership of the property.

There is evidence to the effect that, through the influence of the defendant, plaintiff was taken or sent by him to a lawyer of his own selection and prevented from having independent, competent legal advice, or advice of her own

friends, and that she did not understand the nature of the transaction or the legal effect or meaning of the deed which she was thus persuaded to execute. She admits that it has always been her intention, and is now, to give this property to her grandson when he is twenty-one years of age, and that she wants it held in trust for him until that time, but she did not intend to convey it to defendant, and was not aware as a matter of fact, that she had done so, but supposed she was making a provision for the benefit of her grandson in accordance with her own plan. She wanted the property to go to her grandson, if he lived, and wanted him to have it when he was twenty-one years of age, but, if he died, she wanted to make other provisions for disposing of the property.

We are constrained to hold, as did the district court, that the fraudulent representations, threats and the undue influence set forth in the complaint, were established by the evidence in accordance with the rule laid down by this court in a number of cases.

But it is said that there was no proof of these alleged acts of the defendant, except the testimony of the plaintiff, and that she was an incompetent witness under our statute, since the defendant and the intervener are defending the action in a representative capacity as heirs at law of Mrs. Berlin. We do not so understand. If the plaintiff had made a valid conveyance of the property to her daughter and such title had remained in the daughter up to the time of her death, then, under the law of this State, the defendant would be entitled to an undivided half, and the intervener to an undivided half of the property, and there might be some semblance of a claim that they appeared in this action as heirs at law of Mrs. Berlin. The trial court found, and we think correctly, that Mrs. Berlin never acquired any right, title or interest in this property. The plaintiff does not deny that her deeds to her daughter, if proper delivery had been made, would have conveyed good title. The plaintiff asserts only the invalidity of the deed of March 22, 1919, made direct to this defendant. She is

suing him and intervener as individuals and not as representatives of the estate of Mrs. Berlin. They are here defending as individuals and not as heirs of Mrs. Berlin. The plaintiff is not claiming anything from the estate of Mrs. Berlin, and she was clearly a competent witness against the defendant and intervener in their individual capacity. Without the testimony of plaintiff, we may add there is enough testimony in the record to warrant the decree of the court as to want of title in Mrs. Berlin.

Considering the confidential relation of the plaintiff and the defendant, under the authorities it was incumbent upon the defendant to show the fairness of his conduct in his dealings with her. He did not do this to the satisfaction of the trial court.

The defendant and intervener, through their counsel, lay much stress upon the fact that by this deed to the defendant, plaintiff was doing only what it was her intention to do, namely, to make provision for her grandson. It is true that such was her intention and as the result of a paper writing, which the defendant gave to the plaintiff at the time of the transaction, he was holding this property in trust for the use and benefit of his son, the plaintiff's grandchild, and the conveyance was upon the condition that the plaintiff should have such amount of the income from the property as was necessary for her maintenance and support during her life. But it is not true that the conveyance in question was what the plaintiff intended to make and supposed she was making. She did not wish the defendant to have any title in the property, either for his own benefit or as a trustee for his son. As above indicated, she wanted the boy to have this property when he reached the age of twenty-one years, but in case of his death, she intended to make other disposition of the property and did not want to make a conveyance that would, in case of the death of her grandson, inure to the benefit of the defendant. There was no provision in the deed providing for such disposition of the property as the plaintiff wished to make in the event of the death of her grandson.

It should also be said that the plaintiff, assuming her testimony to be true, did not have the benefit of intelligent advice of an attorney of her own choice as to what provisions were necessary for carrying out the intention which she said she disclosed to the attorney whom the defendant selected for her. Counsel for the plaintiff are not attacking this attorney for any impropriety, nor do we intend to reflect in any degree upon him, but we are impressed with the conviction that the defendant's influence was so overpowering and controlling with the plaintiff that when she interviewed the attorney who drew the deed and the so-called trust agreement, the plaintiff, in her disclosures to the attorney, was merely imparting information which the defendant wished her to make.

Plaintiffs in error, apparently anticipating that the deed might be declared invalid on the grounds alleged, say that adequate relief may be afforded by the removal of the trustee and the appointing of a trustee satisfactory to the plaintiff. And the defendant himself in his testimony says that he is willing to relinquish the trust conferred upon him or make such conveyance of the property as will secure for his son the rights which he insists that it was the intention of the plaintiff to give him. This is upon the theory that he holds merely as trustee for the son and that which the deed accomplishes is only what the plaintiff herself intended to do, which was the vesting of the property ultimately in her grandson. The defendant and intervener, therefore, say that the deed should not be cancelled, even though it was procured by fraud. This reasoning is no more than plausible. It is what the defendant did at the time, not what, after suit, he offers to do to prevent cancellation, that determines the validity of the instrument. If the instrument was vitiated by frauds at the time of its execution, confession thereof by the one who perpetrated them does not make the instrument valid. But aside from this, the deed does not effectuate plaintiff's real intention. She testifies that it is her intention, now as always, to have her grandson enjoy this property but she wants to designate

for herself how, and the conditions under which, the enjoyment shall be had. So that the offer of the defendant to resign his trust, if he should make that offer, and his willingness to execute such a writing as may be necessary to enable his son to get this property, furnish no reason for refusing the cancellation of the deed, if it was procured by his fraudulent conduct.

On the question of the delivery of the deed in escrow, with the power or right reserved to the grantor of control over the instrument, and to make other disposition of the property conveyed, if she saw fit, see 13 Cyc. p. 569 and following. This authority and cases cited fully justify the plaintiff in this case in withdrawing the deeds from the escrow holder and destroying them. The grantee in these deeds, Mr. and Mrs. Berlin, recognized the right of the plaintiff to withdraw the deeds, and the grantee, Mrs. Berlin, herself, knew of and ratified the plaintiff's acts. See, generally in support of this judgment: *Hutcheson v. Bibb, et al.*, 142 Ala. 586, 38 So. 754; *Gibson v. Hammang*, 63 Neb. 349, 88 N. W. 501; *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393.

On the competency of Mrs. Wait to testify: *Gledhill v. McCoombs*, 110 Me. 341, 86 Atl. 247, 45 L. R. A. (N. S.) 26, Ann. Cas. 1914D, 294.

On undue influence: *Davis v. Parsons*, 165 Cal. 70, 130 Pac. 1055; *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *Feit v. Reichert*, 68 Colo. 410, 189 Pac. 854; *Fritz v. Fritz*, 80 N. J. Eq. 56, 83 Atl. 181.

It appears also from the uncontradicted evidence of apparently disinterested witnesses, that at the time of the conveyance this plaintiff was mentally incapable of making a valid deed. Not only was there testimony of laymen to this effect but also of a competent physician. It is certainly very material evidence upon the question of the exercise of undue influence, for if the plaintiff was mentally incompetent to transact business, and the evidence in this case is that she was wholly unacquainted with business affairs, it certainly is a very potential circumstance to con-

sider in connection with undue influence. It would be much easier for such influence to have a controlling effect upon a person thus afflicted.

The findings of fact being supported by the evidence, which was of the probative effect required in such cases, the judgment and decree should be affirmed, and it is so ordered.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,112.

MCANDREWS v. THE PEOPLE.

Decided July 3, 1922.

Plaintiff in error was convicted of murder in the second degree.

Reversed.

1. CRIMINAL LAW—*Murder—Malice—Blow of Fist.* To make a homicide murder, it must have been perpetrated with malice. Ordinarily a blow with the fist does not imply malice, an intent to kill. There may be circumstances surrounding such a homicide from which an inference of malice would be proper.
2. *Instructions—Assumption of Facts.* Instructions should be based upon the evidence, and an instruction, although announcing a correct principle of law, that impliedly assumes the existence of evidence which was not given, is erroneous.
3. INSTRUCTIONS—*Malice—Erroneous.* Instruction reviewed and held to be erroneous as containing statements of fact which might have misled the jury; and in conflict with the great weight of decisions on the question of implied malice.
4. CRIMINAL LAW—*Implied Malice—Jury Question.* The question of implied malice is for the jury, to be determined under proper instructions as to the law, and with the facts in evidence alone as the basis of the finding.

Error to the District Court of the City and County of Denver, Hon. Warren A. Haggott, Judge.

Mr. E. M. SABIN, Mr. A. E. MCGLASHAN, Mr. L. P. ERNY, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. FORREST C. NORTHCUTT, assistant, Mr. JAMES E. GARRIGUES, for the people.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

HARRY MCANDREWS, hereinafter referred to as defendant, was tried for the murder of one Keim, hereinafter designated by name, or as deceased, and found guilty of murder in the second degree. He brings the record here on error for review.

The essential facts are that Keim and McAndrews, on the evening of Sunday, November 21, 1920, were driving in the same direction across the Twentieth Street viaduct, in the city of Denver. The defendant, in a truck, passed the car in which the deceased was driving, and shortly thereafter collided with another automobile. Deceased stopped his car in the immediate vicinity of the accident, gave his name to the owner of the damaged car, and offered himself as a witness in case needed. This precipitated an altercation between himself and McAndrews. The latter is a vigorous man, of robust health, about twenty-five years old, weighing about one hundred and ninety-five pounds.

It appears that the defendant struck Keim with his fist in the face, knocking him down on one knee. According to some of the witnesses, this blow was followed up by other blows while Keim was retreating. Where these other blows struck Keim, or what their effect was, does not appear. Later after deceased had returned to his own car, McAndrews attempted to drag him out by the leg, evidently intending further punishment.

On the Tuesday following the altercation Keim died, and an autopsy showed that his skull had been fractured at its base, at the back of the head. McAndrews and Keim were total strangers.

To make the killing murder, it must have been perpetrated with malice. Ordinarily a blow with the fist does not imply malice, an intent to kill.

In *Murphy v. People*, 9 Colo. 435, 13 Pac. 528, this court quotes with approval from *Commonwealth v. Fox*, 7 Gray, (Mass.) 585, as follows:

"If, therefore, death should ensue from an attack made with the hands and feet only, on a person of mature years, and in full health and strength, the law would not imply malice, because, ordinarily, death would not be caused by the use of such means. But the inference would be quite different if the same assault and battery were committed on an infant of tender years, or upon a person enfeebled by old age or worn out with disease."

In the case above mentioned this court pointed out, as bearing upon the question of malice, that the assault was there made upon one physically weak and diseased, and known to the defendant so to be.

A recent case on this subject is *People v. Crenshaw*, 298 Ill. 412, 131 N. E. 576, 15 A. L. R. 671, wherein the facts are strangely similar to those of this case, and the law announced, therefore, peculiarly applicable. Death was the result of a blow struck by defendant with his fist only. He was found guilty of murder. The facts were in substance that defendant struck the deceased after a quarrel, during which defendant asserted to deceased that for two cents he, defendant, would kill him then and there. The court, in discussing the law applicable to the facts, said:

"The circumstances which distinguish murder from manslaughter have been passed upon by this court in many cases. Malice necessary to constitute a killing murder is presumed where the act is deliberate and is likely to be attended with dangerous or fatal consequences. (Citing authorities.) Death or great bodily harm must be the rea-

sonable or probable consequence of the act to constitute murder. (Citing authorities.) The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and no inference of an intent to kill is warranted from the circumstances disclosed by the proof in this case."

The court recognized, however, that there might be circumstances surrounding such a homicide from which an inference of malice would be proper.

From these considerations it appears clearly that the important matter for the jury to determine was whether, under all the circumstances of the case, the defendant was actuated by malice, in law; that is, did he seek to take the life of Keim. This being so, it was of the utmost importance that the jury be fully and properly instructed upon that phase of the case.

Objection is made to Instruction No. 4, and the giving of it is the principal error argued in this case. It laid down as the rule governing on a question of malice, or intent to kill, the following:

"The court charges you that, if you believe from the evidence, beyond a reasonable doubt, that the defendant assaulted and unlawfully struck the said W. G. Keim upon a vital part of his body with great force and violence, and that such striking was, on account of the extreme age and debility of said W. G. Keim, and on account of its force, violence and aim, an act which in its consequences would naturally and probably destroy the life of said W. G. Keim, and did in fact occasion his death, then you may infer that the defendant was actuated by malice in committing such act, without further proofs, for malice may be implied when a person without any considerable provocation does an act naturally tending to destroy life. The Court does not say that you must draw the inference of malice from such conduct. The responsibility is yours to determine such malice on the consideration of the evidence and the circumstances of the case, and if you are fully satisfied from the evidence beyond a reasonable doubt that the de-

fendant assaulted, and unlawfully, wilfully and maliciously struck, bruised and wounded the said W. G. Keim so that he died in consequence thereof, and that such striking was inflicted by the defendant upon the vital parts of the said W. G. Keim's body, in such a manner and with such force, as that the death of the said W. G. Keim was occasioned thereby, then you are justified in presuming an intent to kill on the part of the defendant, on the principle that a man is presumed to intend the natural and probable consequences of his own voluntary act; and if you are thus satisfied from the evidence, beyond a reasonable doubt, of such wilful and malicious act, with intent to kill the said W. G. Keim, by the defendant by the means aforesaid, and that such act did thus occasion his death, then you should find the defendant guilty of murder in the second degree, as charged in the indictment; but you should not find the defendant guilty of murder in the first degree under such circumstances, unless you should be satisfied further from the evidence beyond a reasonable doubt, that such killing was wilful, deliberate and premeditated on the part of the defendant."

The objection is that the instruction assumes matters not in evidence. The testimony showed that the deceased had always been well, never had serious sickness. His son said he was fifty-eight years old. He weighed from two hundred to two hundred ten pounds. The reference, then, to his extreme age and debilitated condition, is wholly without evidence to support it. Indeed, it is directly contrary to the facts as shown in evidence.

That jurors give great weight to every remark by a trial judge is common knowledge, and it has frequently been commented upon in reported decisions. When, then, this instruction was given, it was almost certain to produce in the minds of the jurors an impression that the court regarded the evidence as showing extreme age and debility on the part of the deceased. A juror would naturally conclude that he had overlooked some testimony, and would accept the court's statement as in accord with the facts.

In *Coors v. Brock*, 44 Colo. 80, 96 Pac. 963, this court cites with approval the following from *Fisk v. Greeley Electric Light Co.*, 3 Colo. App. 319, 33 Pac. 70:

"The instructions should in all cases be based upon the evidence, and an instruction, no matter how correct the principle which it may announce, that impliedly assumes the existence of evidence which was not given, is erroneous. It is calculated to bewilder and mislead the jury by producing the impression that in the mind of the court, some such state of facts as the instruction supposes, may be inferred from the evidence given, or concealed within it. The authorities upon this proposition are numerous and uniform."

See also, *Johnson v. The People*, 197 Ill. 48, 64 N. E. 286.

There is a further objection to the instruction in that it assumes that the blow was delivered with great force and violence upon a vital part of Keim's body. The only evidence as to the force of the blow is found in the fact that it caused Keim to fall on one knee. There is no evidence to justify the use of the word "vital," and as there was no evidence as to what part of the body would be vital under a blow from the fist, the jury were likely to understand that the court considered that a blow on the cheek was upon a vital part. This is made more important by the repetition in this instruction of the words "vital parts." The jury were told that if they were satisfied that defendant struck, bruised and wounded Keim, "so that he died in consequence thereof, and that such striking was inflicted by the defendant upon the vital parts of said W. G. Keim's body, in such manner and with such force, as that the death of said W. G. Keim was occasioned thereby, then you are justified in presuming an intent to kill on the part of the defendant, on the principle that a man is presumed to intend the natural and probable consequences of his own voluntary act."

By this instruction the jury was in effect told that it could imply malice from the act, and the result. Thereunder, any assault with the fist which results in death,

however unexpected and unintended, might be held to constitute murder.

It is in conflict with the principle upon which it is alleged to be based, i. e. that one is presumed to intend the natural consequences of his act; because all human experience goes to show that death does not ordinarily result from a blow with the fist.

It charges the defendant with knowledge of the special physical condition, whatever it was, that caused death to follow in this case from an act which does not ordinarily produce that result. Defendant must be judged as to his mental condition by the facts as they naturally appeared to him at the time of the assault.

This is held in *Murphy v. People, supra*, where the following is quoted with approval from the Massachusetts case:

"In the present case, therefore, if the evidence satisfies the jury that the prisoner, at the time he committed the assault and battery on the deceased, knew, or had reasonable cause to believe, that she was sick and suffering from disease, and was thereby put in such a weak and feeble condition that his attack would endanger her life, or inflict on her great bodily harm, or hasten her death, it would justify the jury in finding implied malice, and convicting the prisoner of murder. But if he was not aware of her sickness and had no reason to suppose that his acts would do her material injury, or any harm beyond that which would be occasioned by similar acts to a person in health, there would be no sufficient evidence of implied malice."

The instruction is supported by no authority, and is in conflict with the great weight of decisions which hold that malice is implied only when the homicide is committed by the use of a dangerous weapon, or instrument, in such a manner as naturally and probably to cause death.

That there may be cases in which malice may be implied, where the homicide was committed by means not ordinarily likely to produce death, has already been indicated. It is a question for the jury, to be determined under proper in-

structions as to the law, and with the facts in evidence alone as the basis of the finding.

To affirm the judgment would be to announce a rule of law in conflict with the overwhelming weight of authority, and establish a principle certain to lead to grave injustice.

The judgment is reversed and the cause remanded for further proceedings in harmony with the views above expressed.

MR. JUSTICE DENISON and MR. JUSTICE BURKE dissent.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE BURKE dissenting:

With firm confidence in my associates I now, as always, dissent from their conclusion with reluctance. Conscious of the general uselessness of minority opinions I would write one only when firmly convinced that some good might thereby be accomplished. Compelled by my judgment and conscience to dissent in the instant case I am unable to ignore the fact that a precedent is here being established which may smooth the path of wrong-doers and embarrass officials charged with the execution of the law and the protection of society. Although handed down en banc the opinion is approved only by a minority of the Justices and its brief statement of facts seems to me to give a wholly erroneous idea of the transaction in question. Believing that I may be able to make the weakness of that precedent apparent, and cause the enemies of peace and good order seeking to hide behind it in the future to feel less secure, I must point out what seems to me its inherent error.

But two questions raised by the forty-six assignments of error in this case are worthy of consideration. They are: First, That death unintentionally resulted from a simple assault and battery, a misdemeanor, and that therefore malice, an essential element of murder, did not in fact exist and could not be implied; second, that for the reason just given, and the further reason that it mis-states the

evidence, instruction No. 4 was erroneous and prejudicial.

Counsel for defendant adopt an ingenious method of attacking this verdict, i. e., instead of directing their investigation first to the crime of murder and the elements thereof, if any, proven in the case before us, they quote our statutes on manslaughter, voluntary and involuntary, numerous authorities defining those offenses in the broadest terms, and then attempt to show that the facts of this case bring it within those definitions, as if the duty devolved upon this court to overturn the verdict if possible. Appellate courts are too prone to overlook the well established principle that all presumptions are in favor of the judgment. If there be a reasonable view of the evidence which will support the finding of the jury we must accept it. That law is as old as jury trials. Following it what do we find?

On Sunday, November 21, 1920, this defendant, accompanied by Cefalu and Calionni, was driving a truck across a crowded viaduct in this city at forty miles an hour. No excuse worthy of the slightest consideration appears for that conduct. He was not only insolently indifferent to the rights and safety of other travelers but was trying to see how close he could come to them without a collision. The deceased, accompanied by his son Thurman E. Keim, the latter's wife and nine year old boy, all of whom were perfect strangers to the defendant, were driving in the same direction in a closed car. Defendant passed them, as he did others, avoiding a collision by the narrowest possible margin. A short distance ahead, and with an interval of time so brief as to be inconsequential, defendant collided with and considerably damaged a Ford car and was engaged in some kind of dispute with the driver thereof when deceased arrived upon the scene. He walked up to the Ford driver, handed him his card and stated that he had witnessed the conduct of defendant, knew him to be at fault in the collision and volunteered, if needed, to appear as a witness. Defendant, apparently infuriated by this offer stripped off his coat and as deceased was walking away from him, pur-

sued and viciously attacked him. He knocked deceased down upon his hand and one knee and continued his assault until Thurman E. Keim arrived upon the scene and interfered. Pushing between defendant and his victim, Keim Jr., received a blow intended for his father. Cefula, Calionni and others were aiding and abetting defendant in this assault and encouraging him to pursue it. Distracted from their victim by the interference of his son they directed their attention to the latter and pursued him, fighting, up a side street until Thurman, thinking himself in grave danger and the assault upon his father no longer threatened, fled. Deceased, dazed and stunned, had taken refuge in the closed car the door of which his daughter-in-law had locked for his protection. As defendant returned from his pursuit of Thurman he discovered Keim Sr., in the car. Crying out, "There he is now, I'll kill him," and repeating during that attack that if he could get him out of there "he would kill the old son of a gun," he broke open the door of the car, grabbed deceased by the legs, pulled him part way out of the car and "tried to break his legs and kill him." To Mrs. Keim's earnest protest he answered, "If you don't shut up I'll bust you in the nose." (The only significance which the majority opinion attaches to this conduct is that defendant was "evidently intending further punishment.") Keim Jr., had sent in a call for the police and it is perfectly apparent that only the approach of the officers put the defendant to flight. After the assault deceased had a cut over his left eye and the right side of his face was bruised, swollen and discolored along the cheek bone and back across the ear, he had a bad headache and was hardly in his right mind. Later that evening he seemed better. The next morning, still suffering from a pain in the head, he went to the police station to make a report, intending thereafter to go elsewhere in the city, but feeling worse returned to his home. At 4 p. m. he was suffering great pain. At 7 he became unconscious, with symptoms of hemorrhage of the brain, and at 7:25 the next morning he was dead, having lived just thirty-eight and

one-half hours after the assault. An autopsy disclosed a ruptured blood vessel in the brain, a hemorrhage inside the brain covering beneath the external bruise, a fracture at the base of the skull and a six ounce blood clot. Deceased was fifty-eight years of age, weighed approximately two hundred pounds, was apparently in good health and had never had any serious illness. Defendant was twenty-five years old, weighed one hundred and ninety-six pounds, was formerly a common laborer, spent two years in the military service during the World War, being a member of the 115th Engineers, and was employed in November, 1920, by the Kistler Stationery Company of Denver whose truck he was driving. After the assault defendant did not re-possess the truck. It was taken in charge by the police. Defendant apparently conscious of the fact that he had committed a serious offense, disappeared down an alley and did not return to his place of employment the following morning. Keeping in concealment he read in the public press the account of the assault and that he was wanted by the police. Tuesday evening he learned in the same way of the death of Keim Sr., and Wednesday noon he gave himself up.

From the undisputed testimony in this case it is perfectly apparent that the death of Keim was directly and solely due to a fractured skull caused by a blow delivered by defendant, and no reasonable man sitting as a juror in this case could, in my opinion, by any possibility reach any other conclusion or have a shadow of a doubt about that one. For the present I will assume, as counsel for the prosecution seem to have done, that the blow referred to was given with the bare fist.

"Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." Sec. 1622 R. S. 1908.

That the killing in the present instance was unlawful and was effected by one of the means by which death may be occasioned requires no argument. Did malice exist?

"Express malice is that deliberate intention unlawfully

to take away the life of a fellow creature which is manifested by external circumstances capable of proof." Sec. 1623 R. S. 1908.

Defendant made every possible effort with the means at hand to destroy the life of deceased. In the prosecution of that purpose he never once paused of his own volition. During the attack he twice declared his intention to kill. If the jurors based their verdict upon express malice I think it sustained by the evidence. If not was malice properly implied?

"Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart." Sec. 1624 R. S. 1908.

The provocation which will reduce the grade of the offense from murder to manslaughter must be such provocation as would produce an irresistible passion in a reasonable person. Sec. 1626 R. S. 1908. The passion thus produced must be, "that sudden violent impulse of passion supposed to be irresistible." Sec. 1627 R. S. 1908. There was here then a total absence of provocation.

Do all the circumstances of the killing show an abandoned and malignant heart? The word "abandoned," as here used, means having thrown off all self-restraint and pursuing a lawless and evil course with utter indifference to consequences. "Malignant" means governed by malice, not necessarily malice toward a particular individual but a "reckless disregard of human life proceeding from a heart void of a just sense of social duty and fatally bent on mischief." Michie on Homicide Vol. II, p. 81.

Certainly the conduct of this defendant from the moment he appears upon the scene in this case, driving like an insane man on a crowded public thoroughfare, assaulting and declaring his intention to kill an aged and unoffending citizen, raining upon him blows from which he died, driving off the son of his victim who had interfered to save his father, returning from the pursuit and renewing the attack which had been thus interrupted, breaking open the door of an automobile to accomplish his purpose, until he fled

down an alley to escape the officers who had been summoned reveals in the clearest and most unmistakable light a heart which meets all definitions of abandonment and malignancy.

Malice is a condition of heart and mind concerning which the possessor only can give direct evidence, and proof of its existence must always be circumstantial; hence the statute says it is that deliberate intention to take life "which is manifested by external circumstances capable of proof." Also that it may be implied (as a matter of fact by the jury never as a matter of law by the court) when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart. The absence of considerable provocation, or the presence of an abandoned and malignant heart, are "external circumstances capable of proof." So despite these labored definitions no real distinction exists. The question is one of fact, the fact must be implied from the proof of other facts and the implication must be by the jury.

If by any process of reasoning we can doubt the existence of malice from the facts hereinbefore recited we may address ourselves to the question of manslaughter.

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture or deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection." Sec. 1625 R. S. 1908.

"In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." Sec. 1626 R. S. 1908.

Defendant makes no claim that deceased attempted to commit upon him any injury, personal or otherwise. There was then no provocation and could be no finding of volun-

tary manslaughter. This brings us to the position taken by counsel for defendant, that the offense here committed was involuntary manslaughter, punishable by not to exceed one year in the county jail.

"Involuntary manslaughter shall consist in the killing of a human being without any intent so to do; in the commission of an unlawful act or a lawful act which probably might produce such a consequence, in an unlawful manner; Provided, always, That where such involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." Sec. 1628 R. S. 1908.

If now we concede that this was a killing without intent and in the commission of an unlawful act, i. e., assault and battery as contended by counsel for defendant, still it occurs to me that that assault and battery was committed in such a way and with such force and violence as naturally tended to, and in fact did, destroy human life, hence it must be deemed and adjudged to be murder. I think if we accept plain language applied to a plain statement of facts for the guidance of plain men seeking to do a juror's simple duty, there is no escape from the conclusion and that the foregoing statutes applied to the facts in this case require no aid from judicial precedent. But let us go a step further and examine those precedents.

It is said that malice may never be implied from the use of the bare fists. But malice is not an implication of law but one of fact and facts are implied by the jury not by the court. Wharton on Homicide, pp. 142, 143; *Hill v. People*, 1 Colo. 436, 447; *Kent v. People*, 8 Colo. 563, 571, 9 Pac. 852; *Nilan v. People*, 27 Colo. 206, 211, 60 Pac. 485; *Zipperian v. People*, 33 Colo. 134, 142, 79 Pac. 1018; *Young v. People*, 54 Colo. 293, 311, 130 Pac. 1011; *Craft v. State*, 3 Kan. 450, 486; *U. S. v. King*, 34 Fed. 302, 311.

In the following cases a conviction of murder was sustained where no weapon was used. *State v. John*, 172 Mo.

220, 72 S. W. 525, 95 Am. St. Rep. 513; *M'Whirt's Case*, 3 Grat. (Va.) 566, 46 Am. Dec. 196; *State v. Hamilton*, 1 Houst. Cr. Cas. (Del.) 101; *State v. Hyland*, 144 Mo. 302, 46 S. W. 195.

Cases seeming to justify the contrary position may be found. The only one in this jurisdiction is *Murphy v. People*, 9 Colo. 435, 13 Pac. 528. In that case Mr. Justice Elbert, considering the proposition that malice might not be implied when hands and feet alone were employed as a means of assault, declined to accept it, adopting instead the doctrine as qualified in *Commonwealth v. Fox*, 7 Gray (Mass.) 585. In the Massachusetts case an attempt was made to distinguish between those cases where malice might be implied by the jury and where it might not. Such an attempt must always be futile and can furnish no aid to the profession or the courts because no two cases stand upon the same facts. It is after all a simple question of whether there is or is not, in the judgment of the court, sufficient evidence to support the implication. But in the *Murphy* case the entire discussion is dictum because there the verdict was manslaughter. The judgment was affirmed and no consideration of the question of implied malice was necessary to a determination of the case. It is therefore no authority on this subject.

In *People v. Crenshaw*, 298 Ill. 412, 131 N. E. 576, 15 A. L. R. 671, quoted in the majority opinion, the conclusion was doubtless correct though I am unable to accept the reasoning. *Crenshaw* struck but one blow and of his own volition turned and walked away. Such is the basis of the court's declaration that it was clear from the evidence the blow "was not delivered with the intent of causing death." That was a simple case of want of evidence. In the *Murphy* case our own court, in the *Crenshaw* case the Supreme Court of Illinois, and in the *Fox* case the Supreme Court of Massachusetts, recognizes that there may be instances where an assault with the bare fist may be accompanied by facts and circumstances which prove malice. Hence the whole question is one of fact for the jury. It thus seems

to me that the very authorities relied upon in support of the majority opinion refute the conclusion therein that, by the overwhelming weight of decision, malice may be implied only when the homicide is committed by the use of some dangerous instrument or weapon.

It might be added here that defendant's own evidence, taken in the light of other facts established beyond a reasonable doubt, sustains his conviction. His evidence excludes mutual combat, self defense, or any adequate provocation, and death having resulted from his assault the conclusion of murder is irresistible. *Van Houton v. People*, 22 Colo. 53, 66, 43 Pac. 137.

Before leaving this branch of the case notice must be taken of a very significant bit of evidence, apparently overlooked by counsel for the people, but the full force of which may not have escaped the attention of the jury. Defendant says that as Keim Jr., fled he (McAndrews) took a silver dollar out of his pocket and threw it at him. Standing alone no more foolish, absurd and palpably untrue statement could have been made by him. It is clearly an attempt to minimize and gloss over a very damning piece of evidence given on behalf of the people, i. e., that during McAndrews' attack witnesses who observed him from the time he first struck the deceased until Thurman E. Keim fled from him did not see him put his hand in his pocket, but did see him throw after Keim J., two silver dollars which throughout the assault he had apparently held in his hand. It may well be that the jurors understood that silver dollars gripped in the hand and protruding between the fingers are, in a fistic combat, almost as deadly as "brass knucks" and that for a strong and vigorous man to fracture an opponent's skull with such a weapon is easily within the range of probability. If the jurors believed, as well they might, that such was the weapon which caused death in the instant case, further contention on this branch of the case is foreclosed.

This disposes of the question of law raised under the objection to instruction No. 4. I have yet to examine the con-

tention that the language of said instruction "on account of the extreme age and debility of said W. G. Keim" is prejudicial error because it is the court's statement of a fact unsupported by the evidence, and is improper comment on the evidence. Whether, under the circumstances of a given case, fifty-eight years is or is not "extreme age" is a question for the jurors and this instruction submits it to them. True there is no direct evidence of "debility" but as counsel for defendant themselves contend that death in the instant case was not the natural and ordinary result of a blow, and as no intervening or contributing cause appears, death must have resulted from some latent weakness, defect or debility in deceased. Such was of necessity the position of the defense and the instruction properly submitted that question to the jury for its determination.

It is further said in the majority opinion that this instruction "assumes that the blow was delivered with great force and violence upon a vital part of Keim's body," and "the jury were likely to understand that the court considered that a blow on the cheek was upon a vital part." The court's statement of an admitted fact is never held improper comment. It is no more correct to speak of such a blow on the head as "a blow on the cheek" than it would be to speak of a shot through the heart as "a shot through the skin." If the instruction assumed "force and violence" the facts are not disputed and it is no violent presumption that a blow which knocked down a man weighing two hundred pounds, fractured his skull and caused his death was "delivered with great force."

The majority opinion seems to me a sign board to those who seek to take human life, pointing out to them the means which may be used by one who would be immune from the penalty which the law fixes for murder. It is a warning to those who would fearlessly do their part to put a stop to that reckless driving of automobiles which leaves wrecked vehicles and maimed and lifeless bodies in its wake, that they take their own lives in their hands when they interfere. It is another stone in the wall of unsound

precedent behind which criminals seek to barricade themselves in their war upon society. We should be diligent in tearing down that barrier, not in strengthening it. The judgment should be affirmed.

I am authorized to state that Mr. Justice Denison concurs herein.

No. 10,132.

WARNER v. THE PEOPLE.

Decided July 3, 1922.

Plaintiff in error was convicted of loaning money in violation of the provisions of section 1, chapter 159, S. L. 1919.

Affirmed.

1. CONSTITUTIONAL LAW—*Statutes—Money Lenders.* Section 1, chapter 159, S. L. 1919, concerning licenses for those engaged in the business of loaning money in sums less than \$300 at a greater rate than 12 per cent per annum, held to contain nothing touching the question of due process as those words are used in the Constitution.
2. STATUTES—*From Other States—Decisions.* Where a Colorado statute is copied from the laws of another state, its appellate decisions relative thereto, existing at the time, will be controlling on Colorado courts.
3. CONSTITUTIONAL LAW—*Legislation.* Section 21, article 5 of the Colorado Constitution, does not prohibit the legislature from placing one limitation on the rate of interest on small loans, and another for large ones.
4. *Statute—Title.* Section 1, chapter 159, S. L. 1919, concerning the licensing of money lenders, not unconstitutional on the ground that the subject of the act is not embraced in the title.

Error to the District Court of the City and County of Denver, Hon. A. F. Hollenbeck, Judge.

Mr. JOHN S. STIDGER, for plaintiff in error.

Mr. VICTOR E. KEYES, attorney general, Mr. SAMUEL CHUTKOW, assistant, Mr. CHARLES H. SHERRICK, assistant, for the people.

En banc.

MR. JUSTICE DENISON delivered the opinion of the court.

PLAINTIFF in error was convicted under section 1, chapter 159, S. L. 1919, of engaging in the business of loaning less than \$300 at a greater rate than twelve per cent per annum, without a license. He was also convicted on a count under section 17 of the same act, but the court set aside the verdict on that count. He brings error and attacks the constitutionality of the act on the following grounds:

1. That it deprives defendant of due process of law.
2. That it is a special law where a general one could have been made applicable, and so violates section 21 of article 5 of the Colorado Constitution.
3. The subject of the act is not expressed in the title.
4. It violates section 3, article 2, of the Colorado Constitution in that it deprives plaintiff in error of the right to acquire, possess and protect property.
5. It impairs the obligation of contracts.

As to the first point there is nothing in the act touching the question of due process. Counsel argues, however, the question of equal protection. We took this statute from Illinois. The question was determined there before our act was passed. *People v. Stokes*, 281 Ill. 159, 118 N. E. 87.

The second point amounts to a proposition that the legislature cannot fix one rate of interest for small loans and another for large which needs but to be stated to be refuted. The power of the legislature is not so limited.

As to the third point: The subject-matter of section 1,

upon which the defendant was convicted, is expressed in the title. The title is as follows:

"To license and regulate the business of making loans in sums of Three Hundred Dollars (\$300.00) or less, secured or unsecured, at a greater rate of interest than twelve (12) per centum per annum, prescribing the rate of interest and charge therefor, and penalties for the violation thereof, and regulating the assignment of wages or salaries, earned or to be earned, when given as security for any such loan."

The section is as follows:

"That no person, co-partnership, or corporation shall engage in the business of making loans of money, credit, goods, or things in action in the amount, or to the value of three hundred dollars (\$300), or less, and charge, contract for, or receive a greater rate of interest than twelve (12) per centum per annum therefor, except as authorized by this act and without first obtaining a license from the State Bank Commissioner hereinafter called the licensing official."

This section is part of an act which provides for licensing the business of loaning three hundred dollars or less at a greater rate of interest than twelve per cent per annum and so is within the scope of the title.

We say nothing as to section 17 because the Attorney General has not assigned error with reference to it.

The proposition on the 4th and 5th points are so manifestly unfounded that they require no answer.

Judgment affirmed.

MR. CHIEF JUSTICE SCOTT and MR. JUSTICE CAMPBELL not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,226.

SHOVER, ET AL. v. BUFORD, ET AL.

Decided July 3, 1922.

Action to restrain a bond issue for school purposes. Decree restraining issue beyond the limit fixed by statute.

Affirmed.

1. **APPEAL AND ERROR—Pleadings—Rulings of Trial Court.** Assignments of error, based upon rulings of the trial court upon the pleadings, involving questions largely in the discretion of the court, and in which there is no substantial error or abuse of judicial discretion, will not be considered.
2. **SCHOOLS—Bonds—Excessive Issue.** Where a school district may become indebted in a certain amount by bonds, and the electors of the district authorize a debt in excess of that amount, such authorization is void only as to the excess, and valid as to the sum which it was within the power of the district to issue.

Error to the District Court of Las Animas County, Hon. A. F. Hollenbeck, Judge.

Mr. EARL COOLEY, Mr. J. B. BETTS, for plaintiffs in error.

Mr. O. H. DASHER, Mr. JOHN N. MABRY, for defendants in error.

En banc.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

THIS action is by resident tax payers and qualified electors of school district No. 82 of Las Animas County to restrain a \$20,000 bond issue by the defendants, who are members of the board of education of the school district. Bonds to this amount were authorized by the qualified electors of the district at an election called under the statute for the purpose of contracting a bonded indebtedness in that sum to build a school house.

The objection to the issuing of the bonds, as set up in the complaint, is that, when this election was held, a bond issue in that district could not exceed the sum of \$14,160, and although the board of directors, under the authority of chapter 205, Session Laws of 1909, fixed the amount of \$20,000 to be voted upon by the qualified electors, and the latter duly voted to contract the debt and issue bonds therefor, the entire issue is invalid.

The original answer of the defendants was attacked by motion and the defendants asked, and were granted, leave to file a first amended answer and a second amended answer, which, in turn, were attacked by the plaintiffs by motion for judgment on the pleadings, to make more specific, and upon other grounds. A third amended answer was duly filed, on which the cause went to trial, as it was deemed sufficient by the court. This last pleading of defendants admitted that the issue of bonds in the sum of \$20,000 as voted by the electors, was in excess of the maximum sum authorized by statute, \$14,160. Defendants allege that as a board they do not intend to issue more than this maximum amount. There being no substantial dispute as to the facts, the court issued an injunction restraining the defendant board from issuing more than \$14,160, and gave it permission to issue that amount only. A review of the judgment is sought in this court by the plaintiffs.

The plaintiffs assign as error the rulings of the court upon various questions affecting the answers, but, inasmuch as the plaintiffs' motions involve questions whose determination is largely in the discretion of the trial court, and as we perceive no substantial error in the rulings, or abuse of judicial discretion, such alleged errors will not be considered.

The parties themselves are in accord that the substantial question involved is whether the vote of the electors at the called meeting to instruct the school board to issue bonds in the sum of \$20,000 for building a school house, which sum is in excess of the statutory limit, prevents the board

from issuing bonds for the lesser sum of \$14,160, which is within the limit?

Section 2 of chapter 205, Session Laws of 1909, reads as follows:

"The amount of the bonded indebtedness proposed to be contracted shall, prior to such submission to said electors, be determined by said board of directors but in no event shall the aggregate amount of bonded indebtedness of any school district of the first or second class exceed five per centum or of any school district of the third class three and one-half per centum of the assessed value of the property in such district for the year next preceding the date of said bonds."

Both parties, in their briefs, overlook the fact that all of chapter 205 of the 1909 Session Laws had been repealed by chapter 181, Session Laws of 1919, pages 601-610. The later act, not the former, therefore, was controlling at the time of the election held in this district, April 30, 1921. But section 2 of the act of 1909, above quoted, is, so far as concerns the limit of indebtedness, in districts of the third class, the same as section 2 of the act of 1919, viz. "Three and one-half per centum of the assessed value of the property in such district for the year next preceding the date of the bonds." The decision of this case must be the same under either act.

It is the contention of the plaintiffs that, since it was the duty of the board, prior to the submission to the electors of the proposition to issue bonds, to fix the amount of the indebtedness proposed to be contracted, the statute must have a literal construction, and that the fixing of the amount, through oversight by the board, in excess of the statutory limit, which the electors sanctioned, does not authorize the board to issue bonds for a lesser sum than that, which is within the statutory limit; in other words, that the vote by the electors of a larger sum can not be held to authorize the issue of bonds in a smaller sum which is within the legal limit. To this proposition plaintiffs cite *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866.

We do not think that case sustains them. It was held there that a school board is merely the agent of the qualified electors to issue bonds, and, after such issue is authorized by their vote, the board, being merely their agent, possesses only the ministerial or administrative power to carry out literally the mandate. If such be the law it is not the equivalent of a holding that the board may not issue bonds in a total sum less than that authorized by the electors, provided the same is within their statutory authority. That was a suit by qualified electors of a school district to restrain the issue of bonds, alleging that enough illegal votes were cast in favor thereof to change the result. It appears from the statement of facts that a stipulation was entered into by the school board, the defendant, and the plaintiff for entry of a judgment, without taking any evidence, permanently enjoining the issue of bonds so voted. The court held that this stipulation constituted a collusion and a fraud on the district and on the court and might be set aside in an appropriate proceeding by appropriate parties. It was in connection with such a question that the declaration was made, which the plaintiffs here say is an authority, that the school board might not issue any portion of the bonds involved in the pending action. We do not so construe that decision, but, if such effect is given to it, we think it is contrary to the weight of authority.

In *Stockdale v. School District No. 2 of Wayland*, 47 Mich. 226, 10 N. W. 349, in an opinion by Judge Cooley, it was held that a vote of the electors of a school district, in favor of the issuance of bonds beyond the statutory limit, nevertheless was valid to the extent that would have been admissible had the limited sum been proposed and voted, and cites *McPherson v. Foster Bros.*, 43 Iowa, 48, 22 Am. Rep. 215. In the Iowa case there is an elaborate discussion by the court of this proposition. The court said that, where a school district may become indebted in a certain amount by bonds, and the electors of the district authorize a debt in excess of that amount, such authorization is void only as to the excess and valid as to the sum which

it is within the power of the district to issue. That decision seems to us directly in point and is authority for the judgment entered below authorizing an issue only of a lesser amount than that voted, because it was within the power of the district to vote such lesser sum, and such authority to issue the lesser, is included in the vote for the larger sum, a part of which is invalid.

In *Vaughn v. School District 31*, 27 Ore. 57, 39 Pac. 393, the court decided that, where two-thirds of a proposed expenditure by a school district for building a school house, is the measure of the power to issue district bonds, and the school board, although instructed by the electors to issue such bonds in the sum of \$3,000, had no authority to issue them in behalf of said district in a greater sum than \$2,000, but the vote of the electors was sufficient authority for the issuance of bonds to the extent of the lesser sum, and the board was permitted to issue them in that proportion.

In *Kirby v. City of Monroe*, 214 Mich. 615, 183 N. W. 216, after approving the McPherson case in 43 Iowa, the court said that it was one of the early cases on the subject and had been followed by many authorities and referred to 28 Cyc. 1584, with approval, where the author states that bonds of this character, which in the aggregate exceed the limit, are void only to the extent of the excessive issue, and that, where the issue of bonds is only partially excessive, the amount of the issue within the limit is valid. To the same effect are *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897, 29 L. Ed. 1026, and *Sutro v. Pettit*, 74 Cal. 332, 16 Pac. 7, 5 Am. St. Rep. 442.

In *Meyer v. City and County*, 150 Cal. 131, 88 Pac. 722, 10 L. R. A. (N. S.) 110, the decision was that, in the case of an over issue of bonds, they would all be valid, except those issued after the limit was reached.

In 19 R. C. L. 1021, Sec. 313, the author says an over issue of bonds does not affect the validity of the entire issue authorized, but only those in excess of what was authorized, citing a number of cases, some of which have already been referred to.

Plaintiffs say there is a distinction between some of these cases which we have cited, that involved the validity of bonds issued and disposed of, and where, as here, the issue is not yet made, and where the suit is to restrain the entire issue. We do not perceive any valid distinction in principle between the two classes of cases. It is fair to presume, when there is no evidence to the contrary, that electors of a school district, who vote in favor of an issue of bonds in the sum of \$20,000, would vote for an issue of \$14,160. There is force in the argument that the electors of district No. 82 had no opportunity to express themselves as to an issue of any bonds except one for \$20,000, and that if they had been called upon to vote for an issue of \$14,160, they might have considered it inadequate for the construction of a school house which they wished to build, and would have voted against the proposition for a sum which seemed to them inadequate. While appreciating the force of the argument, we are of the opinion that, by the weight of authority, and upon principle, the vote of the electors in this district was a sufficient authorization to the defendant school board to issue bonds in the maximum sum authorized by the statute, as applicable to a school district of this class, in the absence of evidence that the smaller sum would not have been voted. The judgment of the district court, being in accordance with this view, is affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,232.

WEIR, ET AL. v. WELCH.

Decided July 3, 1922.

On motion to vacate order assessing damages.

Motion Denied.

1. SUPREME COURT—*Jurisdiction*. Where, in accordance with the provisions of section 6, chapter 6, S. L. 1911, a stay is granted by the Supreme Court on the essential condition of payment of any damages suffered by the defendant in error thereby, the court has power to assess the damages occasioned by the stay and to enter an order for the payment thereof.

Error to the District Court of the City and County of Denver, Hon. Clarence J. Morley, Judge.

Mr. F. W. SANBORN, Mr. HERBERT M. MUNROE, for plaintiffs in error.

Mr. KENT S. WHITFORD, Mr. HARRY C. DAVIS, Mr. STANLEY T. WALLBANK, for defendant in error.

En banc.

MR. JUSTICE TELLER delivered the opinion of the court.

PLAINTIFF in error was defeated in a suit against him in forcible detainer, and brought the cause here on error. He applied for a supersedeas and a stay of execution. We granted the stay upon condition that plaintiff in error give a bond to pay all damages, resulting from such stay, which might be awarded by this court. Later supersedeas was denied and the judgment affirmed. A referee was appointed to report on the damages to defendant in error by reason of being kept out of possession of the property in question. The parties appeared by counsel, and evidence as to the rental value of the premises was taken, on which the referee found that the damages were \$162.50.

This finding was adopted by this court, and an order en-

tered that the plaintiff in error pay to defendant in error said sum of \$162.50, and \$38 costs. He moves to vacate the order on the ground that this court had no jurisdiction to enter it.

The assumption is that the court's order is the result of an action on the bond. Such is not the case.

The stay was granted "on terms," in accordance with the provisions of section 6 of chapter 6, Laws of 1911, the essential condition being the payment of damages suffered by the defendant in error because of being deprived of possession of his property.

Counsel for plaintiff in error concedes that the bond was required under the law above mentioned, being given in compliance with the "terms" named in the order.

This court has power to use such writs or proceedings as are necessary to the suitable exercise of the jurisdiction conferred upon it. *Wheeler v. N. C. Irr. Co.*, 9 Colo. 248, 11 Pac. 103. We must not, therefore, be considered as basing this proceeding wholly on the statute above cited.

Plaintiff in error obtained an obvious benefit by the stay of execution, and it ill becomes him now to attempt to escape compliance with the condition upon which that benefit was secured.

The question of a counterclaim on the part of plaintiff in error was rightly refused consideration by the referee.

The motion to vacate the order is denied.

MR. JUSTICE DENISON not participating.

No. 10,360.

FINN v. SAFFER.

Decided July 3, 1922.

Action for injunction. Decree for plaintiff.

*Affirmed.**On Application for Supersedeas.*

1. **EASEMENT—Ditch Right of Way—Parol License.** An easement for the construction and use of an irrigating ditch across land may be created by parol license; but to perfect the right, there must be a construction followed by continued use.
2. **Irrigating Ditch—Enlarged Servitude.** Where one is granted a parol license for the construction and use of an irrigating ditch, he cannot enlarge the servitude or build another ditch at a different place on the land.
3. **APPEAL AND ERROR—Fact Findings.** Fact findings by a trial court, supported by competent evidence, will not be disturbed on review.

Error to the District Court of Garfield County, Hon. John T. Shumate, Judge.

Mr. C. W. DARROW, for plaintiff in error.

Mr. J. W. DOLLISON, for defendant in error.

En banc.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

THE plaintiff owns several contiguous tracts of land in Garfield County, and the defendant owns land situate to the south and across a public highway therefrom. Defendant asserts ownership of a sublateral irrigating ditch over and across one of plaintiff's 40 acre tracts. He demanded of the plaintiff permission to enter upon the same to clean

out, or construct, a ditch on the line of the asserted easement. The plaintiff denied the request, observing at the time that he would protect his lands from trespass at the point of a gun. Thereupon the defendant had the plaintiff arrested for threatening to break the peace and the magistrate required the plaintiff to give the prescribed bond and, while the bond was in force, the defendant entered upon the land and, as he says, cleaned out the ditch in question which had become filled up, and, as plaintiff says, constructed an entirely new ditch, which he continued thereafter, and till this action was begun, to use in diverting water from the main canal to irrigate his lands lying below plaintiff's tract.

Plaintiff brought this action and asked for a decree declaring his land not subject to the asserted easement; for an injunction to restrain defendant from entering upon his land or using the ditch; and for damages suffered by the defendant's wrongful acts. A temporary injunction was issued as prayed for, and, upon final hearing before the court, without a jury, the same was made permanent and a money judgment of five hundred dollars damages was awarded. As plaintiff offers to remit damages, that feature is not now in the case.

The defendant is here with the record and asks for a *supersedeas*. It would be idle to grant this request since the judgment is clearly right and sustained by the evidence, as we proceed to show. Defendant's claim of ownership of the ditch and easement is based upon an alleged irrevocable, accepted parol license given to the defendant's remote grantor by the then owner of plaintiff's lands, to build an irrigating ditch across such lands to carry water to irrigate the lands of the licensee, which ditch was built in 1906 or 1907. Unquestionably such an easement may be created either by a writing or parol license. The deeds which the defendant offered in evidence to show his claim of title to the alleged easement, contain no mention or reference to any such easement, either as appurtenant to the lands conveyed or to any other land, and there is no evi-

dence that it was the intention of any of the grantors of these lands to convey the ditch and easement in question. In so far as the defendant's right rests upon deeds of conveyance, there is no evidence to uphold it.

But defendant says that his grantor was given a parol license, by the then owner of plaintiff's lands, to build a ditch across these lands, and that the license was accepted and the ditch constructed and used for the purpose indicated. Defendant's evidence to sustain this claim is not made out. The witness Prendergast—defendant's remote grantor—a witness for defendant, says that he built a ditch across the lands which are now the plaintiff's by permission of one Fleming, who was then part owner, and the ditch was constructed jointly by the licensor and licensee so that they might be able to use a greater head or volume of water by combining their respective appropriations and carrying the same at one time in this ditch. Prendergast, however, says that this arrangement did not prove satisfactory to either party and such use was discontinued after two seasons and he made no further use of the ditch in question thereafter. His right under a parol license depended upon continued use. See *Arthur Irrigation Company case infra*. There is no other testimony that the ditch was used or attempted to be used for any purpose by any person for a period of at least twelve years after the discontinuance mentioned, and no claim adverse to the rights of plaintiff was ever asserted until defendant acquired ownership of the Prendergast land about twelve years after Prendergast had abandoned or relinquished use of the ditch. The court's finding is sustained by evidence that there never has been a continuous use of this ditch, and there is enough evidence to justify the finding of the court that it was the intention of Prendergast to abandon, and that he did abandon, any rights that he may have acquired through the alleged license of the then owner.

When plaintiff bought his land and examined it at the time, he found no trace of the alleged ditch and there was nothing on the ground to indicate that there ever had been

a ditch at the place where defendant in his testimony located it, and there is nothing of record in the County Clerk's office to show that plaintiff's land was subject to any easement for this ditch, or for any ditch. Besides this, while there is a conflict in the evidence, there is sufficient, competent and legal evidence to sustain the finding of the trial court that the ditch which Prendergast built and used was by permission of the part owner of the land on which it was situate, and was on another 40 acre tract about 170 feet east of the place where the defendant cleaned out or constructed a ditch in 1920, the ditch of which he now claims ownership. If, therefore, the defendant is or was the owner of an easement or right of way for a ditch and of the ditch itself across the plaintiff's lands, he could not enlarge the servitude or build another ditch at a different place. *Arthur Irrigation Co. v. Strayer*, 50 Colo. 371.

Then, too, there is evidence that at the time Prendergast built a ditch, wherever it was located, he was a tenant of the owner of the land across which it was built and he could not assert a hostile title to his landlord, and that the arrangement for the building of the ditch was for the mutual accommodation of the parties, and there was no intention to grant a permanent easement that would pass by a conveyance as an appurtenance to Prendergast's lands, and that the right acquired, whatever it was, was temporary and was abandoned within two years and never re-asserted until the defendant asserted the right.

It should be said that as to most, if not all, of the substantial issues of fact involved, the evidence was in conflict. The court, having seen the witnesses and heard their testimony, was better able to judge of their credibility and of the weight and sufficiency of the testimony than this court is. It is sufficient to say that the vital questions in the case were questions of fact and the findings, being in favor of the plaintiff and being supported by competent evidence, this court should not set them aside. The application for *supersedeas* is denied and the judgment affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

No. 10,367.

THE FARM PRODUCTS, LAND AND INVESTMENT CO. v. STOUT.

Decided July 3, 1922.

Action on contracts. Judgment for plaintiff.

*Affirmed.**On Application for Supersedeas.*

1. **APPEAL AND ERROR—*Fact Findings.*** Where the conflict in evidence is positive, material and irreconcilable, and the judgment, neither manifestly nor otherwise, against the weight thereof, it will not be disturbed on review on the ground that it is not justified by the evidence.
2. **CONTRACT—*Construed.*** Under a contract, plaintiff was to receive for his assistance in effecting the sale of a ranch, "one half of all sums in excess of \$132,000 received for the ranch property." Held, that he was entitled to one half of such excess without the deduction therefrom of other commissions and expenses.

Error to the District Court of El Paso County, Hon. Arthur Cornforth, Judge.

Messrs. HARRIS & PRICE, for plaintiff in error.

Messrs. STRACHAN, TURNER & CARRUTHERS, for defendant in error.

En banc.

MR. JUSTICE BURKE delivered the opinion of the court.

DEFENDANT in Error brought this action against plaintiff in error to recover the sum of \$4000.00 and interest, alleged to be due on three written contracts. To review a judgment in favor of the former against the latter in the sum of \$3240.00 this writ is prosecuted and the cause is now before us on application for supersedeas. The parties are hereinafter designated as in the trial court.

Plaintiff rented of defendant two properties, a ranch

and a residence, and separate leases were executed. At the same time, and as a part of the same transaction, the parties entered into a third contract by which it was agreed that if plaintiff complied with his covenants and gave defendant his assistance "to effect a sale" of the ranch defendant would, in the event of such a sale, pay plaintiff "one-half of all sums in excess of \$132,000.00 received for the ranch property." This contract also covered the residence but as no question arises herein in connection therewith that portion of it will not be further noticed. The ranch was sold, the contract price being \$140,000.00, plaintiff was not paid, and this suit resulted.

Two questions only are here argued by counsel for defendant: 1. The sufficiency of the evidence to justify the finding that plaintiff complied with his contracts; 2. The court's alleged erroneous interpretation of that portion of the third contract hereinabove quoted.

1. The trial court found generally for plaintiff. Counsel for defendant admit the rule that a judgment based upon conflicting evidence will not, on review, be disturbed for want of facts. They urge, however, two alleged exceptions: First, where the conflict is not substantial; second, where it is slight and the judgment manifestly against the weight of the evidence; and contend that this case falls within both.

Assuming, but not here holding, the existence of such exceptions and their correct statement, we are forced to the conclusion that this case does not fall within either. There are approximately 260 typewritten pages of the evidence and we have been obliged to examine the entire transcript with care. No good purpose can be served by an extended discussion of the testimony. Suffice it to say that the conflict in this evidence is positive, material and irreconcilable, and the judgment is neither manifestly, nor in our opinion otherwise, against the weight thereof.

2. It is urged that the proper interpretation of the language "one-half of all sums in excess of \$132,000.00 received for the ranch property" turns upon the meaning of

the word "excess" and that its correct definition required the deduction of all expenses of the sale. Based upon that interpretation the defendant demands credit for \$4000.00 commission paid to another agent and \$140.00 expended for revenue stamps on the deed. The position is untenable. The meaning of the word "excess" as here used is clear and we see no reason for surprise at counsel's inability to find authorities supporting their definition. The controlling language is, "received for the ranch," and that language is likewise so explicit as to require no construction. From what defendant "received for the ranch" he might pay out such sums as he pleased but his expenses thus discharged could in no way affect plaintiff's right to one-half of such excess. The trial court so held and properly deducted from the total sum \$750.00, rent due defendant under the lease, and \$634.00, necessary rebate allowed the purchaser of the ranch for deficiency in the acreage.

The briefs of counsel here filed cover 86 typewritten pages and seem to us full and complete. In view of the care with which we have examined these briefs, the consideration we have given the entire record, and what seems to us the total absence of reversible error, we think further presentation and consideration unprofitable.

The supersedeas is denied and the judgment affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

MR. JUSTICE TELLER sitting as Chief Justice.

No. 10,384.

THE ALAMO HOTEL AND GARAGE Co. v. THE TOLEDO
SCALE Co.

Decided July 3, 1922.

Action for the purchase price of goods sold and delivered. Judgment for plaintiff.

Affirmed.

On Application for Supersedeas.

1. **CONTRACT—Performance.** A contract provided for the sale and purchase of scales specifically described. The article delivered corresponded in every respect with the description, except only the serial number. Held, that this discrepancy was immaterial, and afforded no legal ground for the refusal of the purchaser to comply with the contract.
2. **PLEADING—Estoppel—Evidence.** Pleading and evidence reviewed, and held, that a plea of estoppel was in good form, and sustained by the uncontradicted evidence.
3. **APPEAL AND ERROR—Rulings of Trial Court.** Rulings of the trial court, clearly supported by evidence, will not be disturbed on review.
4. **PRINCIPAL AND AGENT—Authority of Agent.** Evidence to support an alleged counterclaim based on indebtedness contracted by an agent, was properly excluded, where there was no showing that the agent was authorized to incur such indebtedness.
5. **EVIDENCE—Conclusion of Witness—Harmless Error.** While the question: "State if you know how much is now due and owing to the plaintiff from the defendant and for what?", and the answer thereto, might be technically improper, under the facts disclosed, the error is held to be harmless.
6. **DEPOSITION—Notice—Service.** Under the provisions of section 414, code 1908, service on the attorney of record for the opposing party, of notice of application to take depositions, held sufficient, notwithstanding code section 383 provides for service of notice on "the other party."

7. **VERDICT**—*Directed*. Where there was no evidence to support a counter-claim or pleaded defense, it was proper for the court to direct a verdict for plaintiff.
8. **PLEADING**—*Amendment*. Amendments in the furtherance of justice are always looked upon with favor, and in the case under consideration it is held there was no error in permitting plaintiff to amend his reply at the close of the trial, by adding a plea of estoppel.

*Error to the District Court of El Paso County, Hon.
Arthur Cornforth, Judge.*

Messrs. ORR & LITTLE, for plaintiff in error.

Mr. W. M. SWIFT, for defendant in error.

En banc.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

THE defendant in error, The Toledo Scale Company, was plaintiff below, and The Alamo Hotel and Garage Company, plaintiff in error, was defendant. The parties are designated here as there.

The plaintiff scale company brought this action against the defendant to recover the sum of \$310.00, the agreed purchase price of certain scales which the defendant ordered and plaintiff delivered. The defendant in its answer denied the material allegations of the complaint and, as separate defenses, pleaded: (a) That the scales ordered by the defendant were different from those set out in the complaint; (b) That the scales delivered by the plaintiff were not the scales ordered by defendant, but were scales sent for its temporary use until the scales ordered by defendant were received; (c) That the scales ordered by the defendant have never been delivered.

Defendant also filed a counterclaim or cross-complaint against plaintiff in the sum of \$124.82 for board and room of plaintiff's agent at the defendant's hotel, and for storage, repairs and supplies which the defendant from its garage furnished the plaintiff's agent under an agreement with

him that such indebtedness was to be credited on the price of the scales. The new matter of the answer was denied in plaintiff's replication. At the close of the evidence the plaintiff asked, and the court granted its application, for judgment in plaintiff's favor, for the amount of the purchase price and interest. The defendant is here with his application for a *supersedeas*.

Errors assigned and argued are: 1. The contract was not complied with by plaintiff. 2. Error in admitting incompetent evidence over defendant's objection. 3. In overruling defendant's motion to suppress depositions of two witnesses for plaintiff, Peele and Zolg. 4. In granting plaintiff's motion for directed verdict in its favor. 5. In refusing permission to the defendant to offer any evidence under its counterclaim. 6. In permitting plaintiff to amend its replication, thereby introducing a new defense. These in their order:

1. The defendant, by its president, entered into a written agreement with plaintiff, on its customary blank sale orders, for the purchase of a scales specifically described. The proof shows, without any contradiction, that the scales as ordered, in the written agreement, corresponded in description in every respect with the scales received, except only as to the serial number thereof. Upon the trial the defendant's president admitted that the only discrepancy between the scales ordered and those received by the defendant, is that the serial number of the scales delivered is "811-T" instead of "811-N" as described in the contract of sale. As the defendant made no use of the scales after they were delivered, he knew of no other objection to them, except that they had been used for sometime before they were shipped.

It is doubtful, in the absence of any evidence to the contrary, of which there is none, that the mere fact that "T," instead of "N," is used in describing the serial number, while in all other respects the scales delivered correspond with the scales ordered, would constitute a failure on the part of the plaintiff, to comply with the terms of the con-

tract. Indeed, the defendant does not claim that the scales numbered "811-T" are in any wise inferior to, or different from, the scales numbered "811-N." However, under the evidence produced, we are satisfied that the defendant is not in a position to urge that the contract is not complied with.

The court permitted the plaintiff, at the close of the trial, to amend its replication and to plead an estoppel *in pais*, and this plea was that scales ordered by the defendant of the plaintiff were delivered to the defendant within a short time after the order was given, and that the defendant received the same and for a period of one year and five months thereafter, offered no objection to them; never notified the plaintiff that the scales received differed from the order in any respect; never tendered the scales back to the plaintiff, nor made any attempt to rescind the contract because of the alleged non-compliance therewith on the part of the plaintiff. Defendant's president admits, what is set forth in plaintiff's plea of estoppel, and the only excuse that he gives for not notifying plaintiff that the scales shipped were not the ones ordered, is that, while he made no attempt to give such notice to the plaintiff, he was waiting until he could see the plaintiff's selling agent to inform him thereof, but that he was unsuccessful in learning the address of this agent and never made any claim to the agent, or any officer of plaintiff, of such non-compliance until after the suit was brought.

The plea of estoppel is good in form and the uncontradicted evidence sustains it. For this reason alone the trial court was right in holding that the plaintiff, if it did not ship the kind of scales ordered, defendant is estopped to say to the contrary.

2. There is no evidence that these scales were sent for temporary use of the defendant until the scales actually ordered by the latter were shipped, while the ruling of the court, that the scales ordered were received, or at least, defendant may not now be heard to deny it, is clearly supported by the evidence.

3. The court was right in refusing to receive any evidence offered by defendant in support of its counterclaim. The amount claimed therein is \$124.82. It does not appear how much was for board and room of plaintiff's agent, and how much for storage, repairs and supplies, which the counterclaim says were furnished to him, and there is no evidence that the agent was authorized to incur such debt. The written contract of sale says that the sale was for money to be paid within thirty days, and that contract declares that no agent of the company has the right or power to waive any of its terms or to make any other or different agreement concerning the sale of scales than the specifications written into the contract. No proper foundation was laid, therefore, for the admission of evidence in support of defendant's claim that the agent was authorized, expressly or impliedly, by the plaintiff to incur the bills set up in this counterclaim. The court rightfully held that no further evidence to sustain the counterclaim or cross-complaint could be admitted, for the offer made did not include any facts that would tend to prove authority of agent to bind his principal.

4. The alleged incompetent evidence admitted was in answer to this question, propounded to plaintiff's witness Peele, which was taken by deposition: "State, if you know, how much is now due and owing to the plaintiff from the defendant, and for what?" The objection made is that this calls for a conclusion of the witness and is asking the witness to testify to the ultimate fact which the jury only could determine. The answer to the question is "that there is due and owing to the plaintiff from the defendant \$310.00 for the scales delivered."

Counsel cites *Mogote-Northeastern Consolidated Ditch Co. v. Gallegos*, 70 Colo. 550, 203 Pac. 668, as supporting the defendant's contention that admission of this evidence was prejudicial error, in that it calls for a conclusion of the witness and is not a subject of expert testimony. It might be, if there was nothing else in the record on the subject, that the questions and answers were technically

improper. In view, however, of the fact that there was no plea of payment and there was an admission by the defendant that the scales were received, it was, at most, harmless error for the court to admit the alleged objectionable testimony. Not only does it appear from the pleadings, but counsel for the defendant, at the trial, admitted that no payment had been made of the scales. If they were the kind of scales ordered, necessarily \$310.00, together with interest, were due the plaintiff from the defendant. In no sense was prejudicial error committed by the court in this ruling.

5. The defendant moved to suppress the depositions of the witnesses Peele and Zolg. The specific objection is that no notice of the application for a *dedimus* for taking the depositions, as required by section 383 of the Code of Civil Procedure, was served upon the defendant, whose officers were at all times residents of El Paso County, Colorado, and the defendant had not waived service of the notice required by this section. It appears that a notice, however, was served upon the firm of Orr & Little, and acknowledgment of service was made by Judge Little in behalf of the firm, who signed the notice as attorneys for defendant.

The sole question is, whether service of such a notice must be made upon the opposite party, plaintiff or defendant, or whether it may be made upon the attorney of the opposite party, if he has an attorney in the case? Section 383, relied upon by the plaintiff, says that when an application of this character for the taking of a deposition of a non-resident witness, has been made, five days' previous notice to the other party must be given. Defendant says that the expression "the other party" means the plaintiff or defendant and not the attorney of the other party.

If this provision of section 383 was the only statutory provision applicable, it might be that service must be made upon the opposite party himself and not on his attorney. Some of the authorities cited by defendant are to this effect, but section 414 of our Code of Procedure says that in all cases where the party has an attorney in the action or

proceeding, the service of papers, when required, shall be upon the attorney, or upon the party himself, except of summons, writs and other process issued in the suit and of papers to bring him into contempt, which shall be served on the party. By this section it is altogether clear that the notice by the plaintiff of application for a *dedimus* to take the testimony of these two witnesses, was properly served upon the attorneys for the defendant, who appeared in the case and have been the only attorneys of defendant from the beginning of the action to the present time.

6. Defendant says that grievous error was committed by the court in sustaining plaintiff's motion for a directed verdict and in withdrawing the case from the consideration of the jury, because where there is any evidence to establish the plaintiff's cause of action or defendant's defense, however slight such evidence may be, it is error for the court to withdraw the case from the jury or to direct a verdict.

If defendant's premises were sound, the conclusion which he reaches might be upheld. Since we have already held that the court rightfully refused permission to the defendant to give evidence in support of its counterclaim, the only other issue of fact to which the defendant seeks to apply the principle which he announces is, as to whether or not the scales received by the defendant were the kind of scales ordered. We have already expressed the opinion that there was not sufficient legal evidence to sustain the defense that the scales differed from those ordered and which were shipped, but if there was a discrepancy between the order and the scales received, the defendant is not in a position to object, because its President admits facts which we have said sustain the plea of estoppel, in that no objection was ever made by the defendant to the scales received, and no attempt was made to rescind the contract. This is equivalent to the holding that there was no conflict in the testimony as to the only issue of fact which the evidence admitted was offered to establish.

7. We perceive no error in the permission by the court

to the plaintiff to amend its replication by setting up an estoppel. It was in furtherance of the administration of justice, and amendments of this character are always looked upon with favor. *Sigel-Campion L. S. Co. v. Holly*, 44 Colo. 580, 587. This plea of estoppel was addressed to affirmative new matter of the answer, setting up a non-compliance by the plaintiff with the provisions of the written contract of sale.

For these reasons we hold that the errors assigned here by the defendant are not tenable. The proper foundation was not laid for any evidence in support of the counterclaim, and the offer of the defendant to establish the same was not good because there was not even an attempt to show that the plaintiff's agent had any apparent or actual authority for incurring an indebtedness in behalf of the plaintiff, and, in addition thereto, the offer, if allowed by the court, would have been to permit the unambiguous terms of an admitted written contract to be set aside by parol testimony.

To grant this *supersedeas* and postpone decision for further argument would only add to the expense of the litigation without any advantage to the plaintiff in error. The application for *supersedeas* is denied and the judgment is affirmed.

MR. CHIEF JUSTICE SCOTT not participating.

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ACCORD AND SATISFACTION.

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Elements. To constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such conditions. *Id.*

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Fact Findings. Fact findings by a trial court, supported by competent evidence, will not be disturbed on review. *Finn v. Saffer*, 570.

Fact Findings. Where the conflict in evidence is positive, material and irreconcilable, and the judgment, neither manifestly or otherwise, against the weight thereof, it will not be disturbed on review on the ground that it is not justified by the evidence. *Farm Products Co. v. Stout*, 574.

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Bar to Action. An arbitration award made under authority of a duly executed agreement between the parties, bars a legal action involving the same matters. *Smith v. Piercy*, 187.

ASSAULT.

Evidence. It appeared from the evidence that one of the defendants put his foot against a door in an effort to detain plaintiff and get him to surrender a deed which he had in his possession. Held, that the court was not bound to treat this as an assault. *Tennigkeit v. Winegar*, 364.

BANKS AND BANKING.

Liability for Failure to Follow Instructions. Where a consignor of goods, forwards to a bank the bill of lading with instructions to deliver it to the consignee on compliance with certain requirements, and the bank fails to follow the instructions, it cannot escape liability for damages on the ground of ultra vires. *Wolf Co. v. Bank Com'r.*, 486.

Instructions—Evidence. Evidence reviewed and held not to support the contention of a bank that it substantially followed instructions received, and was therefore not liable for damages caused by its alleged failure in that regard. *Id.*

Contract—Breach—Liability. Where a bank is instructed to deliver a bill of lading on compliance with certain requirements by

consignee, and it fails to follow instructions, to the damage of the consignor, there is a breach of a valid contract for which the consignor is entitled to nominal damages at least, if not more, and the fact that the damaged party compromises his claim against the consignee does not affect his right to a verdict, but only the amount thereof. *Id.*

Assessment and Taxation. A bank should be taxed on its taxable assets with such deductions as the law allows. *Washington County v. Murray*, 522.

BILLS AND NOTES.

Promissory Note—Consideration. The relinquishment of a home-
stead entry is a good and valid consideration for a promissory
note. *Huff v. Gets*, 7.

Promissory Note—Indorsement—Limitation. The indorsement
of a promissory note after delivery and which is not a part of the
original transaction, creates a new contract and as to the indorser
the statute of limitations begins to run from the indorsement.
Colley v. Rowan, 17.

Promissory Note—Accommodation Party. One who executes a
note for the purpose of obtaining money for another, and who
receives no part of the fund for his personal use, the entire amount
going to the accommodated party, is an "accommodation party"
as defined by section 4492, R. S. 1908. *McGhee Inv. Co. v. Kirsher*,
137.

Promissory Note—Infirmities—Knowledge. If a note is taken
by endorsement under circumstances which impute knowledge of
infirmities in it, so that the taking of it amounts to bad faith, the
transferee is not a holder in due course. *McClellan v. Morris*, 304.

Negotiable Instruments Act. Sections of the negotiable instru-
ments act, chapter 95, R. S. 1908, reviewed and applied. *Id.*

Negotiable Paper—Title—Agency. One having possession of
negotiable paper has prima facie title thereto; but that title may
be defeated or overcome by evidence that the note is held as an
agent. *Id.*

If the agency permits the agent to receive the proceeds with-
out limitations as to their application, one taking the note need
not follow the proceeds; but if the agency of the party is made to
appear, the principal will not be bound beyond the authority given.
Id.

Where the holder has notice that the party acting as agent is
such, he is bound to inquire into his authority. *Id.*

Check—Indorsement. The indorsement of a check alone is no
evidence that the indorser received any benefit from it. *Watson*
v. Woodley, 391.

Fraud. Evidence reviewed and held sufficient to establish fraud
in obtaining a promissory note and renewal thereof, and notice to
the holder. *McGinnis v. Hukill*, 476.

BONDS.

Irrigation District Bonds. See *Doherty & Co. v. Steele*, 33.

Irrigation District—Judgment for Return or Par Value. It was not error to enter judgment for the par value of irrigation district bonds, in case the bonds could not be returned to the district. *Id.*

Liability of Surety. A surety cannot be bound on a contract radically different from that, to secure the execution of which, it has executed a bond, where the new contract is made without its knowledge or consent. *Empson v. Aetna Co.*, 282.

School—Excessive Issue. Where a school district may become indebted in a certain amount by bonds, and the electors of the district authorize a debt in excess of that amount, such authorization is void only as to the excess, and valid as to the sum which it was within the power of the district to issue. *Shover v. Buford*, 562.

BROKERS.

Real Estate—Commission. When a sale does not actually take place, the broker cannot recover commissions unless he shows that he procured and produced to his principal a person ready, willing and able to purchase the property upon the terms and conditions under which he was authorized to negotiate the sale. *Crampton v. Irwin*, 1.

The ability of the prospective purchaser to purchase is an essential element to be pleaded and established. *Id.*

Real Estate—Commission. A real estate broker is not entitled to a commission until he produces a purchaser able, willing and ready to buy, and no recovery can be had where the proof fails to show that such a purchaser has been produced. *Norris v. Walsh*, 185.

Where the agreement is that the commission is to be paid when the owner received the entire purchase price, and no sale is consummated, an action for commission must fail. *Id.*

Real Estate—Abstract of Title. Claim by a real estate broker for the amount expended for an abstract of title, properly denied, where the owner of the property not only did not authorize the expenditure, but protested against it, she already having an abstract. *Id.*

Real Estate—Authority. Where real estate is placed in the hands of an agent with instructions in general terms to sell, he is not thereby authorized to enter into a contract of sale binding upon the owner. *Crumley v. Shelton*, 466.

CERTIORARI.

Code and Statutory Provisions. The remedies under statutory section 3840, R. S. 1908, and section 331 code, 1908, discussed and distinguished. *Daily Waist Co. v. Harris*, 63.

Statutory Remedy. The rule that the only question to be determined on a writ of certiorari is whether the inferior tribunal has exceeded its jurisdiction or greatly abused the discretion allowed it, has reference only to proceedings brought under the code. It is entirely inapplicable to proceedings before a justice of the peace, in which the party may ignore the code remedy and proceed solely under the statute. *Id.*

CHATTEL MORTGAGES.

Misspelled Name—Notice. Record of a mortgage given by Birmingham is constructive notice of one given by Birmingham. Validity of records and their effect as to giving constructive notice does not depend on accurate spelling, where the inaccuracy is not clearly misleading. *Downer v. Birmingham*, 245.

CIVIL SERVICE.

Court Clerks. The clerk of a court and his deputies are not state officers and are not under civil service. *People, ex rel. v. Luxford*, 442.

Commissioner of Insurance. The commissioner of insurance is a state officer, he is not appointed to perform judicial functions, and is within the classified civil service. *Wilson v. People, ex rel.*, 456.

Provisional Appointments—Removal. A provisional employe in the service of the state, who has not been appointed according to merit and fitness as ascertained by competitive examination, is not "in the classified service," and is not entitled to a hearing before removal. *Id.*

COLOR OF TITLE.

Tax Deed. A deed purporting to convey title may be defective, convey no title, and yet give color of title. *Whitehead v. Dessertich*, 327.

CONSTITUTIONAL LAW.

Appropriation Bills—Title. Attempted action of the legislature to create a new office in an appropriation bill, would be void under article 5, section 32 of the Constitution relating to appropriation bills, and article 5, section 21, regarding titles of acts. *People, ex rel. v. O'Ryan*, 69.

Officers—Void Legislation. Attempt by the legislature in an appropriation bill to legislate one out of office and put another in, held void as being in contravention of article 5, section 32, article 5, section 21, and the civil service amendment of the Constitution. *Id.*

Executive Questions. Under the provisions of section 3, article VI of the Constitution, questions of the executive concerning the constitutionality of proposed legislation are only to be answered when doubt as to the constitutionality is expressed. *In re Executive Questions*, 331.

Workmen's Compensation—Insurance. That part of section 22 of the workmen's compensation act of 1919, providing that the industrial commission shall prescribe the form of contract of insurance for use in insuring compensation, is administrative only, and not unconstitutional as delegating legislative power. *Travelers Ins. Co. v. Industrial Com.*, 495.

Delegation of Legislative Power. Before a statute can be held unconstitutional as delegating legislative power, it must clearly appear that the power in question is purely legislative. *Id.*

Taxation—Real Estate Mortgages. Section 5542, R. S. 1908, concerning assessment of real estate mortgages, is not unconstitutional as exempting property from taxation. Taxing real estate and a mortgage on the property, separately, constitutes a double taxation, and the statute providing they shall be assessed as a unit, and that the notes and mortgage shall not be otherwise returned or assessed, does not exempt the mortgage from taxation. *Washington County v. Murray*, 522.

Statutes—Money Lenders. Section 1, chapter 159, S. L. 1919, concerning licenses for those engaged in the business of loaning money in sums less than \$300 at a greater rate than 12 per cent per annum, held to contain nothing touching the question of due process as those words are used in the Constitution. *Warner v. People*, 559.

Legislation. Section 21, article 5 of the Colorado Constitution, does not prohibit the legislature from placing one limitation on the rate of interest on small loans, and another for large ones. *Id.*

Statute—Title. Section 1, chapter 159, S. L. 1919, concerning the licensing of money lenders, not unconstitutional on the ground that the subject of the act is not embraced in the title. *Id.*

CONTEMPT.

Refusal to Produce Documents. A witness who refuses to produce documents in court as ordered, without justification, is guilty of criminal contempt. *Eykelboom v. People*, 318.

Perjury. A court has a right to punish as a contempt, manifest perjury committed in its presence, where the court knows judicially and beyond doubt that the testimony is false. *Id.*

Purging of Contempt. One who has given false testimony in a court, or conducted himself in an insolent and contemptuous manner in its presence, cannot purge that contempt by a written denial under oath that it ever occurred. *Id.*

Order of Commitment—Recital of Facts. Cases of criminal contempt are not within the provisions of section 356, code 1908, providing that the order of commitment shall recite the facts. In no event would more than a substantial compliance be required. *Id.*

CONTRACTS.

Foreign Language. In the absence of fraud, a party may not avoid a contract which he voluntarily executes, on the ground that he could not read the language in which it was written, and that it was different from what he supposed. In such circumstances it is his duty to obtain a reading and explanation of it before signing. *Erickson v. Knights of Maccabees*, 9.

Construed. A contract for the management of a theater providing for monthly settlements for the business of the four weeks last preceding such settlement, construed to mean final monthly settlements, and not tentative, to abide the result of a final settlement at the close of the entire period. *Cooper v. Woodward*, 90.

Construction—Ambiguity. Courts will not so construe a contract as to render it uncertain, and then admit evidence to explain the ambiguity. *Id.*

Construed. Where a party executes to a bank notes for money which he desires to borrow, and the bank in consideration thereof, agrees to loan him such amount not to exceed the face of the notes, as he shall desire to use, the transaction constitutes a valid contract, and a breach thereof is actionable. *Westesen v. Olathe State Bank*, 102.

Statute of Frauds. While a contract may have been void under the statute of frauds, if it has been fully performed by one of the parties, it is binding on the other. *Foster v. Coffey*, 171.

Specific Performance—Time. Time is not of the essence of a contract, unless so made specifically, or by the circumstances of the case; lapse of time is no objection to the specific performance of such a contract where the plaintiff has been in possession of the property. *Id.*

Real Property—Construed. Contract between parties claiming an interest in land, in which "each consents with the other to be equal owners of said land", construed to be a conveyance each to the other of one half of his or her interest, and based on a good consideration. *Scott v. Brown*, 275.

Modification. Record reviewed and held not to establish that there was any binding contract for the modification of an agreement for the purchase and sale of sheep. *Manby v. Hibbard*, 296.

Construed. Contract construed and held not unilateral nor lacking in mutuality, and valid and binding. *Ellison v. Young*, 385.

Consideration. A contract may be valid, even if no part of the consideration appears upon its face. *Id.*

By Real Estate Agent—Construction. A contract of agency, giving power to sell real estate, is to be strictly construed. *Crumley v. Shelton*, 466.

Written—Parol Evidence. Parol evidence is not admissible to vary the terms of a written contract. *Simpson v. Nelson*, 490.

Statements of Agent. One who signs a contract containing the statement, that no agent is authorized to change, add to, or detract therefrom, is bound thereby, and he cannot defend an action on the contract, on the ground that he trusted, and relied upon representations of the agent, because of his long acquaintance with him and belief in his integrity. *Canon City Co. v. McInerney*, 492.

Forfeiture. Forfeitures are not favored and will only be enforced when the strict letter of the contract so requires. *Phares v. Don Carlos*, 508.

Construed. Where a license is granted by contract, conditioned that it is not to restrict or interfere with the use of the property by first party, its successors or assigns, the condition is in favor of the grantor, to be construed as a protection to subsequent owners of the property, and not a perpetual privilege to the grantee, binding upon succeeding owners. *McLeod v. Colo. Power Co.*, 518.

Construction. Contract construed and held not to contain any words of grant in the premises affected as a "license" only was given for the purposes named. *Id.*

Designation—Construction. While the designation of an instrument does not determine its character, it may be considered as indicating the intent of the parties. *Id.*

Construction. Where the words of a contract are unambiguous, there is no room for construction. *Id.*

Construed. An instrument granting boating, fishing and resort privileges in connection with reservoirs to be constructed, held not intended to take effect except upon the condition named, not a covenant running with the land, and not binding upon the successors of the granting party. Further held to have no connection with the title of the property, and containing no suggestion to a purchaser that he would be expected to comply with its provisions. *Id.*

Construed. Under a contract, plaintiff was to receive for his assistance in effecting the sale of a ranch, "one half of all sums in excess of \$132,000 received for the ranch property." Held, that he was entitled to one half of such excess without the deduction therefrom of other commissions and expenses. *Farm Products Co. v. Stout*, 574.

Performance. A contract provided for the sale and purchase of scales specifically described. The article delivered corresponded in every respect with the description, except only the serial number. Held, that this discrepancy was immaterial, and afforded no legal ground for the refusal of the purchaser to comply with the contract. *Alamo Hotel Co. v. Toledo Co.*, 577.

CORPORATIONS.

Annual Report. The annual report required to be filed by corporations under the provisions of chapter 102, S. L. 1911, must comply with all of its requirements. The act and each part thereof is mandatory, and a failure to give all the information specified, renders a pretended report a nullity. *International State Bank v. McGlashan*, 72.

Pleading—Cause of Action. In an action against the officers and directors of a corporation to make them personally responsible for a debt of the company, the contention that the complaint does not show that the debt was originally contracted within the statutory period, held unavailing in the case under consideration. *International State Bank v. McGlashan*, 72.

Cancellation of Stock. A corporation cannot maintain an action for cancellation of its capital stock issued without fraud, for mere inadequacy of consideration which it had accepted; nor can a shareholder in its behalf. *Soule v. Kunkle*, 221.

Capital Stock—Assessment—Collection. Where the stockholders of a corporation agreed that the company might levy assessments on its capital stock, and that if any stockholder should fail to pay the same, he should forfeit his interest, the remedy for failure to

pay the assessment was forfeiture, and not a suit to collect the amount due. *Quintet Oil Co. v. Big Five Oil Co.*, 232.

Suits by Stockholders. Without a showing that the corporation cannot, or will not bring an action to prevent or redress supposed injuries, a court of equity cannot appoint a receiver at the suit of a minority stockholder and thus take the management of the corporation out of the hands of its directors and stockholders, even for a limited time. *Rude v. Wagman*, 499.

Share-Holders—Judgments. There is a privity between a corporation and its share-holders, and a decree against the former is conclusive upon the latter in respect to their rights as such. *Croke v. Farmers Co.*, 514.

Notice. Notice to corporate officers or agents within the scope of their authority, is notice to the corporation. *Henrie v. Greenlees*, 528.

COSTS.

Officers. No costs can be recovered against a public officer prosecuting or defending as such, in good faith. *People, ex rel. v. O'Ryan*, 250.

Retaxation. When there is no fraud or wrongful purpose or mistake of fact, one may not object further to a taxation of costs against him after he has paid them, or received payment thereof. *Webber v. Phister*, 332.

Discretion. Costs are within the sound discretion of the court, and unless the discretion is abused, orders relating thereto will not be disturbed on review. *Willoughby v. Willoughby*, 356.

Order. There is no authority for compelling defendants to advance any part of probable costs to accrue in a litigation, nor has the court power to make a rule to that effect. *Benham v. Willmer*, 451.

Invalid Order. An order of court which assesses costs not yet accrued, or which affects those who might ultimately be found not to be liable for costs, or who might be taxed with a less amount than in the order specified, is erroneous. *Id.*

COUNTER-CLAIM.

Nature of. Under the provisions of section 63, code 1908, a claim based upon contract may not be set up as a counter-claim in an action founded upon tort. *Ellison v. Young*, 385.

COURTS.

Powers—Subpoenas. Courts have inherent power to issue subpoenas, and that power is not limited to the parties, nor is it affected by section 7, article II of the Constitution concerning search and seizure. *Eykelboom v. People*, 318.

County Court—Jurisdiction. County courts are courts of record having general jurisdiction which is unlimited in the determination of matters growing out of the settlements of estates. *Glenn v. Mitchell*, 394.

Power to Revoke Probate of Will. The county court as a court of probate, may, on proper grounds, revoke the probate of a will. *Id.*

CRIMINAL LAW.

Confessions. Where a statement of a defendant in a criminal case, made before trial, contains an admission that it was freely and voluntarily made, without threats or promises, which admission is supported by testimony, the statement is admissible in evidence. *O'Donnell v. People*, 113.

In passing upon the question of admissibility, considerable discretion is vested in the trial court. *Id.*

Malicious Mischief—Intent. The malicious mischief statute is criminal and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime, independent of any evil purpose or intention. *Koch v. People*, 119.

The statute does not apply to the pulling down of a fence by defendant, erected across land claimed by him and in his possession, without his consent. *Id.*

Verdict—Credibility of Witnesses. The verdict in a criminal case will not be disturbed, on the ground that it is not sustained by the evidence, where that question depends wholly upon the veracity of the witnesses, of which the jury is the sole judge. *Vandiest v. People*, 121.

Verdict—Sufficiency. A verdict in a criminal case which finds the defendant guilty of "robbery with a deadly weapon, to-wit, a gun," is not insufficient because it does not include the words, "as charged in the information," or does not more definitely specify the crime as defined by statute. *Id.*

Continuance. The matter of a continuance rests in the sound discretion of the court, and under the facts of this case it is held the discretion was not abused. *Stone v. People*, 162.

Statutory Construction—Offense on County Line. Under the provisions of section 1974, R. S. 1908, where a criminal offense is committed on a public highway between two counties, the trial may be had in either county. *Id.*

Special District Attorney—Appointment. The condition precedent for the appointment of a special district attorney having been found by the court, and there being nothing in the record to rebut the correctness of the finding, error assigned thereon is overruled. *Id.*

Severance. Where a motion for severance under the provisions of section 1981, R. S. 1908, was denied, and on the trial no objection was made on behalf of either defendant to any evidence which could by any possibility be considered as admissible against one and inadmissible against the other, the ruling of the court in denying the motion is upheld. *Id.*

Endorsement of Witnesses. The names of witnesses, the materiality of whose testimony is first learned by the district attorney upon the trial, may be properly endorsed on the information by

order of court, in the absence of any showing by defendants of surprise or prejudice. *Id.*

Sufficiency of Evidence. Evidence reviewed and held sufficient to support a verdict of guilty. *Id.*

False Pretenses—Intent. To constitute the offense of obtaining money by false pretenses, there must be an intent to defraud. *Roberts v. People*, 198.

Presumption of Knowledge of the Law—Intent. The presumption which is indulged to prevent a violator of the law from escaping a penalty on the ground of ignorance, cannot be used to supply the intent to violate another law. *Id.*

False Pretenses—Injury. To justify a conviction of obtaining money by false pretenses, there must be positive evidence that the complaining party suffered loss on the transaction. *Id.*

Order for Defendant's Witnesses at the Expense of the People. The issuance of an order by the court that the defendant's witnesses in a criminal case may be procured at the expense of the people, under the provisions of section 2005, R. S. 1908, is discretionary, and the discretion was not abused in the case under consideration. *Nesteroff v. People*, 208.

Interpreter. The appointment of an interpreter for witnesses in a criminal case who speak the English language imperfectly, is within the discretion of the court, and in this case no abuse of that discretion is shown. *Id.*

Conduct of District Attorney. Questions and comments of the district attorney on the trial, of which complaint is made, reviewed and held to have been justified. *Id.*

Limitations. Where a criminal information charges grand larceny, that will not prevent the operation of the statute of limitations where the offense proves to be of a lesser grade, prosecution for which is barred by the statute. *Drott v. People*, 333.

Burglary and Larceny—Evidence. In a trial for burglary and larceny, evidence concerning articles not properly involved in the transaction, and which would prejudice the jury, should be excluded. *Id.*

Evidence—Order of Proof. In a criminal case it is error to permit the introduction of testimony in rebuttal, which is clearly a part of the state's evidence in chief. *Id.*

Evidence—Uncommunicated Threats. In a homicide case, evidence of statements of the deceased, made within a very recent time before the killing, and tending to show an attitude of hostility towards defendant, is competent. The fact that such statements were in the nature of threats which were uncommunicated to the defendant did not make them inadmissible. *Bershenyi v. People*, 432.

Intent of Defendant—Evidence. In a homicide case, the exclusion of defendant's testimony as to his intent in striking deceased, is prejudicial error. *Id.*

Instructions—Erroneous. In a homicide case where defendant attempted to justify his act under the doctrine of self defense, it was error to instruct the jury, "that no provocation will justify a person in killing another, nor will it excuse him," the effect being to withdraw his defense from the jury. *Id.*

Instructions—Inconsistent. Where inconsistent statements of law are made in instructions, it is impossible to tell which the jury followed, and in as much as it might have followed the wrong one, such instructions constitute prejudicial error. *Id.*

Evidence—Rebuttal. The admission of improper evidence on rebuttal which was likely to prejudice the jury against the defendant, held error. *Id.*

Murder—Malice—Blow of Fist. To make a homicide murder, it must have been perpetrated with malice. Ordinarily a blow with the fist does not imply malice, an intent to kill. There may be circumstances surrounding such a homicide from which an inference of malice would be proper. *McAndrews v. People*, 542.

Instructions—Assumption of Facts. Instructions should be based upon the evidence, and an instruction, although announcing a correct principle of law, that impliedly assumes the existence of evidence which was not given, is erroneous. *Id.*

Instructions—Malice—Erroneous. Instruction reviewed and held to be erroneous as containing statements of fact which might have misled the jury; and in conflict with the great weight of decisions on the question of implied malice. *Id.*

Implied Malice—Jury Question. The question of implied malice is for the jury, to be determined under proper instructions as to the law, and with the facts in evidence alone as the basis of the finding. *Id.*

DAMAGES.

Measure of. In an action for breach of warranty or false representations, the damage would be the difference in the actual value of the subject of sale and the value it would have had at the time, if it had then corresponded to the warranty, or the representations had been true. *Peppers v. Metzler*, 234.

Breach of Contract. Only such damages are recoverable for a breach of contract of warranty as are shown by the proofs to be the direct and proximate result of the breach. Apprehended damages which are merely conjectural, should be excluded from consideration. *Id.*

Measure of—Instructions. Instructions on the measure of damages in an action for deceit, reviewed and held erroneous. *Flora v. Hoeft*, 273.

Deceit. In an action for deceit, the damages recoverable are those which result directly and proximately from the deceit of which complaint is made. *Id.*

DEATH.

Presumption. The proofs necessary to raise the presumption of

death of a person after disappearance and absence for seven years, must depend upon the facts in each particular case. *Security Benefit Ass'n. v. Verdery*, 150.

DECREE.

Essentials of. A decree should fix with definiteness the rights and liabilities of the parties, and failing to do so, is erroneous and may be void. *Kobitan v. Dzuris*, 339.

DEEDS.

Grantor Without Interest—Grantee. The grantee takes nothing by a deed, and is not bound by reservations therein, when the grantor had no right, title or interest in the property described. *Burt v. Rocky Mt. Fuel Co.*, 205.

Delivery. On the question of the delivery of a deed, the intent of the grantor, where it can be discovered, must prevail. *Phelps v. Phelps*, 343.

Acceptance. The presumption of acceptance of a deed, beneficial to the grantee, obtains only where the facts are known. Where the facts and attendant circumstances are shown, the question must be determined from them; there is no room for presumption. *Id.*

Delivery and Acceptance—Rights of Third Parties. If between the date of a deed and its acceptance, the rights of third parties attach to the property, those rights will be superior to the title of a subsequently assenting grantee. *Id.*

Present—Escrow. A deed placed in the hands of a third person to be delivered to the grantee on payment of the purchase price, is not a present deed, but one in escrow and passes no title until performance of the condition. *Book v. Book*, 502.

Title. An instrument which may never convey title, although known to exist by a subsequent grantee taking for value, in good faith, without fraud, cannot prevent the subsequent deed from becoming effective. *Id.*

Title—Conveyance. One who executes a deed and places it in the hands of a third party for delivery on payment of the purchase price, does not thereby part with his title, and a subsequent deed executed and delivered before the performance of the escrow condition, passes the title. *Id.*

Not Set Aside for Trivial Reasons. If a deed is made by one seized in fee and having a perfect right to convey, other persons cannot question its efficacy in giving title to the grantee, except upon the ground that they are creditors of, or bona fide purchasers from the grantor, or are holders under such purchasers or have authority from them. *Id.*

Escrow—Delivery. Where a deed is placed in escrow to be delivered on the happening of a certain event, with power reserved in the grantor to change its terms or recall the deed, there is no delivery, the document never being actually delivered, and withdrawn and destroyed. *Berlin v. Wait*, 533.

Cancellation—Proof. To justify the cancellation of a deed on the ground that it was procured as the result of undue influence, threats and misrepresentations, the proof must be definite and clear, and the facts in support of the fraud established beyond a reasonable doubt. *Id.*

Validity. A grantee is not bound by a conveyance which was not what she supposed it to be, and which she did not intend to make, its execution being procured by undue influence. *Id.*

Fraud—Validity. If an instrument was vitiated by frauds at the time of its execution, confession thereof by the one who perpetrated them, does not make it valid. *Id.*

Undue Influence—Evidence. Evidence to the effect that a grantor at the time of the execution of a conveyance was mentally incapable of making a valid deed and wholly unacquainted with business affairs, is very potential in connection with the question of undue influence. *Id.*

DEMAND.

Conversion. In an action for the conversion of personal property, a demand is not a necessary prerequisite, where the surrounding facts and circumstances show that it would have been unavailing. *Farmers' M. & E. Co. v. Mulvaney*, 215.

DEPOSITIONS.

Notice—Service. Under the provisions of section 414, code 1908, service on the attorney of record for the opposing party, of notice of application to take depositions, held sufficient, notwithstanding code section 383 provides for service of notice on "the other party." *Alamo Hotel Co. v. Toledo Co.*, 577.

DESCENT AND DISTRIBUTION.

Rights of Widow to Real Property. The rights of a widow to an interest in the real property of her husband under the statute, attach at the instant of the death of the husband. *Phelps v. Phelps*, 343.

DICTUM.

Effect. Where the writer of a judicial opinion discusses a question not involved, or necessary to the decision, the discussion can only be considered as expressing the views of the writer. *Sundin v. Frost*, 367.

DIVORCE AND ALIMONY.

Decree. The innocent party in a divorce action cannot be forced to take a divorce against his or her will. *Willoughby v. Willoughby*, 356.

Property Rights—Contract. The dissolution of the marriage is no part of a contract settling the property rights of the parties. *Id.*

Party in the Wrong has no Vested Right in Interlocutory Decree. In an action for divorce, plaintiff is entitled to a decree if he can prove his allegations; but if he withdraws his complaint

and the case proceeds upon the cross-complaint of defendant, he is left in the wrong and can have no vested right in any interlocutory decree against him based on his own guilt. *Id.*

Property Rights—Tender. It is not necessary in a divorce proceeding, for a wife to tender a return of what has been paid her under a contract settling property rights, before she can petition the court to set aside findings in her favor, and dismiss her cross-complaint. *Id.*

Procedure—Setting Aside Findings—New Trial. It is not necessary for the court after setting aside findings and conclusions in an action for divorce, to grant a new trial. The action may be dismissed on proper motion. *Id.*

Dismissal of Complaint—Collusion. A complaint in a divorce action is properly dismissed, where it is withdrawn with the understanding that defendant will prosecute under her cross-complaint and if she fails to do so the complaint may be reinstated. *Id.*

Such understandings are against public policy and void. *Id.*

Decree. In an action for divorce where the verdict was for plaintiff on all the issues, and the court in its findings adopted and approved the findings and verdict of the jury with an express finding of desertion as alleged in the complaint, the findings were sufficient to support a decree for plaintiff, although silent as to the issues raised by the cross complaint. *Jones v. Jones*, 420.

Decree—Jurisdictional Facts. The jurisdictional facts being admitted by the pleadings, a decree for divorce is not void for failing to recite them. *Id.*

Condoned Adultery. Condoned adultery is not a bar to a divorce, because it is not a ground for divorce. *Id.*

Alimony—Modification of Decree. A court of equity by virtue of its general powers has authority to modify a decree relative to alimony, when changed circumstances make it just and necessary. *Jewel v. Jewel*, 470.

Alimony—Modification of Decree—Jurisdiction of Courts. A decree for divorce and alimony was granted in the county court. Several years thereafter the wife commenced an action in the district court for additional alimony. *Held*, that the action was not one to modify the county court decree—the amount involved being in excess of its jurisdiction—but an independent suit for equitable relief, which the district court had power to grant. *Id.*

DRAINAGE DISTRICTS.

Lands Included. Chapter 12, S. L. 1911, concerning drainage districts, does not contemplate the inclusion within the district of lands which would not be benefited by the drainage system, and the inclusion of which would not be conducive to the public welfare. *Coates v. Commissioners*, 241.

EASEMENT.

Ditch Right of Way—Parol License. An easement for the construction and use of an irrigating ditch across land may be created

by parol license; but to perfect the right, there must be a construction followed by continued use. *Finn v. Saffer*, 570.

Irrigating Ditch—Enlarged Servitude. Where one is granted a parol license for the construction and use of an irrigating ditch, he cannot enlarge the servitude or build another ditch at a different place on the land. *Id.*

EMINENT DOMAIN.

Possession of Right of Way—Effect. Where a right of way for a ditch has been condemned and the ditch constructed and maintained on the ground for years, it constitutes a taking of the property for which the owner must be paid. *Doherty & Co. v. Steele*, 33.

EQUITY.

Complaint. In an action for the return of irrigation district bonds by a tax payer and land owner in the district, the fact that the complaint did not offer to do equity is immaterial under the facts and circumstances in this case. *Doherty & Co. v. Steele*, 33.

Maxim. He who comes into equity must come with clean hands, applied. *Soule v. Kunkle*, 221.

Administrative Bodies—Abuse of Discretion. Equity may relieve from the action of administrative bodies where discretion has been abused, and affords a proper remedy in such cases. *Coates v. Commissioners*, 241.

Forfeiture. Equity will not enforce a forfeiture. *Pharcs v. Don Carlos*, 508.

ESTOPPEL.

Pleading. One relying upon estoppel must plead it. *Sigel-Campion Co. v. Ardohain*, 410.

EVIDENCE.

Proofs in Possession of Opposing Party. The fact that one declines to produce documents showing his relations to one alleged to be his agent, is strongly corroborative of any other evidence of agency. *Doherty & Co. v. Youngblut*, 30.

Error. In an action against an irrigating ditch company for damages to land occasioned by alleged negligent operation of their ditch, it was error to admit in evidence, over objections by plaintiff, an arbitration agreement for the construction of the original ditch of smaller size and which did not contemplate one of the size and capacity, for the negligent operation of which damages were claimed. *Burke v. South Boulder D. Co.*, 58.

It was also error to admit in evidence the findings of the referee and adjudication decree concerning the original ditch, of which the ditch complained of was an extension. *Id.*

Hearsay—Harmless Error. Where a party was allowed to testify to communications received from his foreman as to losses of cattle, the error, if any, was harmless where the facts testified to were corroborated by a witness of the opposing party and were fully

established by the foreman himself. *Capital Livestock Ins. Co. v. Campion*, 156.

Complaint in Another Action. Admission in evidence of part of a complaint filed by defendant in another action, held not error in this case. *Cronin v. Hoage*, 194.

Undue Influence. Evidence reviewed and held not to support the contention that the endorsement of a note by a daughter was procured by undue influence of her mother, the endorsee. *Day v. Broyles*, 196.

Written Instrument—Delivery. A deceased person left a writing acknowledging the receipt of a sum of money for safe keeping; held, that on the hearing of a claim against the estate for this fund, the instrument, although never delivered, was competent evidence. *Thomas v. Johnson*, 200.

Withdrawal of Testimony—Harmless Error. It is erroneous to allow a party, against the objection of his adversary, to withdraw evidence when he finds it unfavorable; but such error is harmless where no prejudice results to the complaining party. *Id.*

Nonsuit. Evidence reviewed and held sufficient to go to the jury, and to require a defense. *Burt v. Rocky Mt. Fuel Co.*, 205.

Contract. The plaintiff may introduce in evidence an express contract under a *quantum meruit* count. *Wallace Plumbing Co. v. Dillon*, 224.

Similar Transactions. While in a proper case, evidence of similar transactions may be introduced to show intent, it should be admitted only in cases where it is clearly competent and relevant to the issue necessary to be determined. *Western L. S. L. Co. v. Creaghe*, 334.

Estoppel. Evidence competent and relevant under the issues was properly admitted, and the fact that it might also have been admissible upon the theory of estoppel which was not pleaded, is immaterial. *Whitescarver v. Interstate Co.*, 416.

Under General Denial. A complaint alleged that a certain street was a public highway. Under a general denial, the introduction of any evidence tending to disprove the allegation was competent, and it was error to exclude a deed showing the street had been vacated, on the ground that the vacation had not been pleaded. *Gromer v. Papke*, 440.

Contract—Parol Evidence. Parol evidence is not admissible to vary the terms of a written contract. *Simpson v. Nelson*, 490.

Court Records—Authentication. An exemplified copy of a journal entry of a foreign state court is inadmissible in evidence in the courts of this state where the certificate of the judge omits the statement that the clerk's certificate is in due form, in compliance with section 393, code of 1908. *Hammit v. Porter*, 511.

Judgment Roll. In an action on a judgment of a foreign state an exemplified copy of the judgment, to be admissible in evidence, should be accompanied by the judgment roll, i. e., the record proper up to the judgment. *Id.*

Undue Influence. Evidence to the effect that a grantor at the time of the execution of a conveyance was mentally incapable of making a valid deed and wholly unacquainted with business affairs, is very potential in connection with the question of undue influence. *Berlin v. Wait*, 533.

Conclusion of Witness—Harmless Error. While the question: "State if you know how much is now due and owing to the plaintiff from the defendant and for what?", and the answer thereto, might be technically improper, under the facts disclosed, the error is held to be harmless. *Alamo Hotel Co. v. Toledo Co.*, 577.

EXECUTION.

Sale—Validity. An execution, and sale thereunder, are valid to the extent of the amount properly awarded by the judgment. *Webber v. Phister*, 332.

EXECUTIVE QUESTIONS.

Premature. Questions propounded by the governor as to the constitutionality of a proposed legislative bill not introduced and which may never be passed, are premature. *In re Executive Questions*, 331.

FINDINGS.

Court Discretion. Under the facts disclosed, it is held that the court did not abuse its discretion in finding for defendant. *Crumley v. Shelton*, 466.

FORFEITURE.

Contract. Forfeitures are not favored and will only be enforced when the strict letter of the contract so requires. *Phares v. Don Carlos*, 508.

Equity. Equity will not enforce a forfeiture. *Id.*

FRAUD.

Defense—Burden. The burden is upon defendant to establish the defense of fraud by clear and convincing proof. *Dyer v. Bengtson*, 55.

Evidence reviewed and held not to sustain the burden in this case. *Id.*

Endorsement of Note to Defraud Creditors—Not Cancelled. The endorsement made with intent to defraud creditors, will not be cancelled at the suit of the endorser. *Day v. Broyles*, 196.

Real Property. Record reviewed and the transaction, concerning real property, held fraudulent and collusive on the part of defendants, and the decree entered in favor of plaintiff upheld. *Scott v. Gregory*, 300.

False Representations—Intent. In an action for rescission on the ground of false representations, if the alleged representations were false and sufficient to justify a rescission, the intent with which they were made is immaterial and not involved in the action. *Western L. S. L. Co. v. Creaghe*, 334.

Scienter—Evidence. The unnecessary allegation of fraud does not make a scienter an element of the case. Not being a matter to be proved, evidence on it should not be admitted. *Id.*

Judgment—Attack. The right to make a direct attack upon a judgment obtained by fraud, is not to be denied. *Glenn v. Mitchell*, 394.

Promissory Note. Evidence reviewed and held sufficient to establish fraud in obtaining a promissory note and renewal thereof, and notice to the holder. *McGinnis v. Hukill*, 476.

Not Established. On review of the record, it is held not to warrant the conclusion that defendant was guilty of any fraud or conspiracy in the transaction under consideration. *Henrie v. Greenlees*, 528.

Conveyance—Burden of Proof. Where a deed was executed by one party to another, the conveyance being induced by misrepresentations of the grantee, between whom and the grantor confidential relations existed, it was incumbent on the former, in an action for the cancellation of the deed by the latter, to show the fairness of his conduct and dealings in the transaction, to the satisfaction of the court. *Berlin v. Watt*, 533.

FRAUDULENT CONVEYANCES.

Husband and Wife. The conveyance of real property by a husband to his wife with knowledge on her part of his fraudulent intent in so doing, is void as against his creditors. *Gwillim v. Asher*, 143.

Creditors. In an action to set aside alleged fraudulent conveyances, it is not necessary that the plaintiff should have been a creditor before the execution of the deeds, or should have been led into giving credit to the debtor under the belief that he owned the property in question. *Id.*

Record—Knowledge of Grantee. By withholding deeds from record with knowledge of the fraudulent intent with which they were given, the grantees become active parties to the fraud. *Id.*

Consideration. A wholly inadequate consideration from a wife to her husband for the transfer of real property, will not defeat an action by a creditor to set aside the conveyance as fraudulent. *Id.*

IDEM SONANS.

Records. The doctrine of *idem sonans* applies to records. *Downer v. Birmingham*, 245.

INDUSTRIAL COMMISSION.

State Compensation Insurance Fund—Control—Investment. The industrial commission has full control of the fund, and nothing is required of the state treasurer but to obey the instructions of the commission as to the investment thereof, under the statute. *Stong v. Industrial Com.*, 133.

INJUNCTION.

Remedy at Law. An injunction is properly denied where the plaintiff has a complete remedy in damages at law. *West Elk L. & L. Co. v. Telck*, 79.

INSANE.

Estate—Compromise of Desperate Claim. Facts reviewed and held, that the county court should exercise its discretion in passing upon a petition to compromise an alleged desperate claim owing the estate of an insane person. *Darrow v. Rohrer*, 417.

INSTRUCTIONS.

Partnership. Propositions of law should be concretely stated and not in the abstract, and the entire law upon any one proposition should, so far as practicable, be embodied in one instruction. *Rocky Mt. Motor Co. v. Walker*, 53.

A requested instruction on partnership held faulty as omitting personal responsibility for partnership engagements and losses. *Id.*

Joint Ownership. An instruction on this subject should tell the jury what in law would constitute joint ownership, and not leave to them the determination of the legal question. *Id.*

Measure of Damages. An instruction as to the measure of damages, held erroneous under the facts of this case. *Peppers v. Metzler*, 234.

Damages—Measure of. Instructions on the measure of damages in an action for deceit, reviewed and held erroneous. *Flora v. Hoeft*, 273.

Assumption of Facts. Instructions should be based upon the evidence, and an instruction, although announcing a correct principle of law, that impliedly assumes the existence of evidence which was not given, is erroneous. *McAndrews v. People*, 542.

Malice—Erroneous. Instruction reviewed and held to be erroneous as containing statements of fact which might have misled the jury; and in conflict with the great weight of decisions on the question of implied malice. *Id.*

INSURANCE.

Life Benefit Certificate—Application. Where the applicant for a life benefit certificate in a fraternal society makes false answers to material questions contained in the application, which he warrants to be true, his beneficiary cannot recover on the certificate. *Erickson v. Knights of Maccabees*, 9.

Life Benefit Certificate—Beneficiary. Where a divorced wife continues to pay the premiums on a life benefit certificate, taken out by the husband, which were accepted by the association with full knowledge that the husband had disappeared; that the wife had remarried; and that she was paying the premiums as the beneficiary designated in the certificate; the association is estopped to dispute her right to recover. *Security Benefit Ass'n. v. Verdery*, 150.

Death of Assured—Presumption from Disappearance and Absence. Evidence reviewed and held sufficient to support findings of the trial court that plaintiff had made due and diligent search and inquiry before bringing suit to recover upon a life benefit certificate, the assured having disappeared and remained absent for more than seven years. *Id.*

Application. Where an insurance policy on livestock provided that the company should not be liable for the death of any cow which was or became bred, but the application contained no answers to questions concerning that subject and was accepted by the company's agent and home office, it was estopped to raise the question as a defense to an action on the policy. *Capital Livestock Ins. Co. v. Campion*, 156.

Payment of Premium—Waiver. A condition of an insurance policy that the insurance should not be in force until the premium was paid, could be waived by a general agent of the company. *Id.*

General Agents—Authority. General insurance agents are empowered to waive conditions of forfeiture in a policy, and their knowledge is the knowledge of the insurer, notwithstanding any excess of their actual authority. *Id.*

Accident Policy—Limitation. An accident insurance policy is not a life insurance policy within the meaning of section 44, chapter 99, S. L. 1913, and division 2 of the section has no application to such policies. *Union Accident Co. v. Welch*, 374.

Automobile Liability Policy. Where an automobile liability policy insures one against loss or expense resulting from claims for damages by reason of the use of an automobile, if the assured incurs a liability to one who is injured by his machine within the conditions of the policy, the insurance company will be liable, notwithstanding the person injured may himself be an assured under the terms of the insurance contract. *Insurance Co. v. Samuelson*, 479.

INTEREST.

It is the rule in this state that interest can only be recovered in the cases enumerated in the statute. *West Elk L. & L. Co. v. Telck*, 79.

INTOXICATING LIQUORS.

Search and Seizure—Home. The evidence disclosed that there was nothing in the basement of a dwelling house except a vat of "mash", an empty tank and some kegs. Held that there was nothing to show that it was used for the ordinary purposes of a cellar in connection with a home, which would make it exempt from search without a warrant under the provisions of section 13, chapter 141, S. L. 1909. *Sullivan v. People*, 376.

IRRIGATION.

Damages—Evidence—Error. In an action against an irrigating ditch company for damages to land occasioned by alleged negligent operation of their ditch, it was error to admit in evidence, over objections by plaintiff, an arbitration agreement for the con-

struction of the original ditch of smaller size and which did not contemplate one of the size and capacity, for the negligent operation of which damages were claimed. *Burke v. South Boulder D. Co.*, 58.

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Irrigating Ditch—Enlarged Servitude. Where one is granted a parol license for the construction and use of an irrigating ditch, he cannot enlarge the servitude or build another ditch at a different place on the land. *Id.*

IRRIGATION DISTRICTS.

Irrigation Districts—Bonds. See *Doherty & Co. v. Steele*, 71 Colo. 33. *Doherty & Co. v. Youngblut*, 30.

Bonds—Return. Where one obtains the bonds of an irrigation district with infirmities, and another secures them from him with knowledge of the defects, both are bound to return them, whether the relation of principal and agent exists between them or not. *Id.*

Bonds Delivered as Partial Performance of Contract. Where an irrigation district delivers its bonds in partial performance of a contract, which is never fulfilled by the contractor, and the work performed is worthless to the district without the completion of the whole, the consideration should be returned. *Id.*

Bonds—Wrongful Delivery. If bonds of an irrigation district are so wrongfully delivered that they ought to be returned, then they to whom they are delivered should return them, and they cannot relieve themselves of the obligation by transferring them to others, whether those others be holders in due course or not. *Doherty & Co. v. Steele*, 33.

Bonds—Return to District. The fact that the district is not liable on bonds which were wrongfully delivered, is one reason why they should be returned. *Id.*

Bonds—Return. In an action for the return of irrigation district bonds, a third party to whom they were delivered, having full knowledge of their infirmities should return them, regardless of the relations existing between himself and the party to whom they were originally delivered. *Id.*

Bonds—Insufficient Consideration. The delivery of certain rights of way of nominal value to an irrigation district, held not a sufficient consideration for a transfer of bonds of the district of the face value of \$250,000.

If the bonds were delivered as an advance payment in contemplation of the completion of a contract for the construction and delivery of an irrigation system, which was never fulfilled, equity requires the return of the bonds. *Id.*

Bonds—Delivery—Res Judicata. The contention that the question of proper delivery of irrigation district bonds had been determined in a prior action in another court, held not supported by the record. *Id.*

Bonds—Conditional Delivery. Bonds of an irrigation district delivered to one conditioned upon the completion and delivery to the district of an irrigation system, should be returned to the district by one receiving them with notice, where the condition was never fulfilled. *Id.*

Bonds—Judgment for Return or Par Value. It was not error to enter judgment for the par value of irrigation district bonds, in case the bonds could not be returned to the district. *Id.*

JOINT TENANCY.

Bank Deposits. A bank account may be so arranged that two persons shall be joint owners thereof during their mutual lives, and the survivor take the whole on the death of the other. In creating such an account, no particular name or formula is required, and courts in construing the transaction will be controlled by the substance of the arrangement, rather than by the name given it. *Miller v. American B. & T. Co.*, 346.

JUDGMENTS.

Motion to Set Aside. A judgment confessed under warrant of attorney will be set aside if a meritorious defense is shown and the application is made in apt time. *Philbrick v. Conejos Co. State Bank*, 19.

Motion to Vacate—Apt Time. Defendant delayed for eighty-six days after having full knowledge of a judgment against him, to file a motion to set it aside. Held, under the circumstances of this case, that the motion was not made in apt time. *Id.*

Justice of the Peace—Limitation—Transcript in District Court—Execution. A judgment of a justice of the peace, after it becomes dormant so that it affords no basis for an action, cannot be made the ground for an execution from the district court by filing a transcript of it with the clerk of that court. *Sundin v. Frost*, 387.

Final—Review. An order of the county court: "That petitioner be allowed to withdraw her claim as prayed in the petition", is not a final judgment and not subject to review on writ of error. *Roberts v. Strong*, 414.

Confession by Attorney—Vacation—Affidavit. A judgment by confession under warrant of attorney must be vacated on motion of defendant made in apt time and supported by affidavit showing a meritorious defense. *McGinnis v. Hukill*, 476.

Such affidavit need not be complete as the pleading of the defense. If the facts disclosed tend to show a meritorious defense exists, it is sufficient. *Id.*

Counterclaim. One who obtains judgment as defendant in an action on a promissory note in which he establishes the defense of fraud, is also entitled to a judgment on his counterclaim for money paid over in the same fraudulent transaction. *Id.*

LAST CLEAR CHANCE.

Instruction. In an action for damages occasioned by an automobile accident, no contributory negligence being shown and the evidence failing to disclose any negligence on the part of the defendant after he saw the danger into which plaintiff had thrust herself, a requested instruction on last clear chance, was properly refused. *Woodward v. McGraw*, 287.

LIBEL AND SLANDER.

Truth of Charge. On review of the case in an action for libel, held that the defense of "truth of the charge" was established by the evidence, and judgment for plaintiff reversed. *Weiss v. Good*, 154.

Libel—Insanity. The publication of an article stating that a person had been recommitted to the insane asylum, does not falsely impute insanity, and is not libel *per se*. *Coulter v. Barnes*, 243.

Pleading—Special Damages. Where the libel is not one *per se*, the plaintiff must allege special damages. *Id.*

Pleading—Variance. In an action for libel, the gravamen of the charge is the publication, and an additional allegation that the defendants conspired together does not affect the sufficiency of the complaint, and the failure to prove the conspiracy does not constitute a variance. *Switzer v. Anthony*, 291.

Mis-Nomer—Identification. Where in an action for libel, the name of the plaintiff was mis-spelled in the alleged libelous article, it is for the jury to say whether there was a sufficiently accurate description to identify the plaintiff, and whether the defamatory matter was published of and concerning her. *Id.*

Intent. In an action for libel, it is not necessary that the defendant should have known and intended to defame the plaintiff. Intent is immaterial except as a part of express malice. *Id.*

Malice—Evidence. Lack of direct evidence of malice alone will not always defeat an action for libel. Where the libelous words are actionable *per se*, malice sufficient to sustain a judgment is presumed. *Id.*

Words Libelous Per Se. The charge that plaintiff called the American flag "a dirty rag", is libelous *per se*. *Id.*

Indirect Charge. Where the libelous article states that the plaintiff had been accused of referring to the American flag as a dirty rag, the effect is the same as though the charge had been made direct. *Id.*

Privileged Publication. The publication of a legal proceeding is qualifiedly privileged, but not until it has gone into court and thereby become public. Moreover, the qualified privilege permits only the publication of a truthful statement. *Id.*

Damages—Proof. The fact that no damage is proven in an action for libel, is immaterial, on motion for a directed verdict, where the case is one of libel *per se*. *Id.*

LIENS.

Agisters. It is essential to the attachment of the lien, that the agister should have possession and control of the animals. *Hill v. Rhule*, 140.

Agister's—Chattel Mortgage. The lien of a prior chattel mortgage is superior to that of an agister. *Id.*

Agisters—Wrongful Possession. There can be no agister's lien founded on wrongful possession. *Id.*

Agisters—Attachment. One who has a lien for the care of live stock, waives it by suing for the amount of the debt and causing the property covered by the lien to be attached. *Id.*

Mechanics' Property Subject to Lien. Under the provisions of section 4029, R. S. 1908, a mechanic's lien attaches to the land of one who knowingly permits his property to be improved, without giving the notice required by the statute. *Johnson v. Stover*, 445.

LIMITATIONS.

Statute of. The running of the statute of limitations does not cancel the debt, the statute goes only to the remedy. *Colley v. Rowan*, 17.

Statutes—Construction. A statute of limitations should not be applied to cases not clearly within its provisions. *Glenn v. Mitchell*, 394.

MALICIOUS MISCHIEF.

Intent. The malicious mischief statute is criminal and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime, independent of any evil purpose or intention. *People v. Koch*, 119.

The statute does not apply to the pulling down of a fence by defendant, erected across land claimed by him and in his possession, without his consent. *Id.*

MANDAMUS.

Officers. Mandamus lies to compel a bonded public officer to do his duty. *Stong v. Industrial Com.*, 133.

MASTER AND SERVANT.

Relation of. Whether in any particular case an employe was acting within the scope of his employment, and was in fact an employe, is to be determined with a view to all of the surrounding circumstances. *Taylor v. Saunders*, 160.

Scope of Employment. A motorman for a railway corporation lost his life while asleep in a car barn of the company which was destroyed by fire through its negligence. Held, that under the circumstances of this case the relationship of master and servant existed between the company and the employe at the time of the accident, and that the employe was acting within the scope of his employment when he met his death. *Id.*

MINES AND MINING.

Duty to Owner of Surface Rights. Unless there be a contract, express or implied, releasing him from the duty, the owner of coal only, when he mines it, must leave sufficient support to sustain the surface above. *Burt v. Rocky Mt. Fuel Co.*, 205.

MONEY LENDERS.

Statute—Title. Section 1, chapter 159, S. L. 1919, concerning the licensing of money lenders, not unconstitutional on the ground that the subject of the act is not embraced in the title. *Warner v. People*, 559.

MORTGAGES.

Sale—Redemption. A mortgagee holding a deficiency judgment after foreclosure sale to a third person, may redeem from that sale as a judgment creditor by virtue of his deficiency judgment. *Leavitt v. Continental Trust Co.*, 3.

Redemption by Judgment Creditor, not a Lien Holder. Under the provisions of section 3653, R. S. 1908, any judgment creditor may redeem from a mortgage sale, and it is not necessary that he should have a lien on the property. *Id.*

Deed a Mortgage. A husband conveyed land to his wife with the agreement on her part that she would at any time on his request, convey or mortgage it to raise money for use in his business. Under this agreement she executed a warranty deed to secure a loan to him. Held, that on payment of the debt so secured, the property should be conveyed to her heirs, she having died in the meantime. *Thomas Realty Co. v. Guthrie*, 98.

MUNICIPAL CORPORATIONS.

Disconnecting Territory. Under the provisions of chapter 52, S. L. 1913, providing for the disconnection of outlying territory from towns and cities, where the city for more than three years had maintained a street adjoining the land sought to be disconnected and lights upon the street, a petition for disconnection should not be granted. *Town of Englewood v. Jones*, 181.

It was immaterial that the lights were upon the opposite side of the street from the land; that the street was at one time a county road, and that the amount of work done upon it by the city was small. *Id.*

Street Lights—Purpose. The purpose of street lights is to light the streets for travel, and not adjoining lands. *Id.*

Street Lights—Maintenance. The furnishing of street lighting by an independent company under contract with a city, construed to be a maintenance of such lighting by the city under the provisions of chapter 52, S. L. 1913. *Id.*

Charitable Bequest. Under a statute of Pennsylvania giving municipalities power to hold property for, and make appropriations to maintain libraries, a town could accept a bequest for a library conditioned upon its perpetually maintaining the same. *Clarion v. Central Co.*, 482.

Charitable Bequest—Condition Subsequent. A charitable bequest to a municipality is not void under the rule against perpetuities. The fact that to the bequest is attached a condition subsequent does not make the rule against perpetuities applicable. *Id.*

NEGLIGENCE.

Defense—Custom. On an issue of negligence the defendant cannot prevail by showing that someone else has committed the same act as that which is charged as an act of negligence. *Burke v. South Boulder D. Co.*, 58.

NEW TRIAL.

Motion. Where the questions before the lower court were purely of law, no motion for a new trial is necessary under Supreme Court rule 8. *Steere v. McComb*, 190.

Newly Discovered Evidence—Affidavit. Affidavit of newly discovered evidence, in support of a motion for new trial, held insufficient. *Cronin v. Hoage*, 194.

Newly Discovered Evidence. The rule is, on a motion for a new trial on the ground of newly discovered evidence, that the evidence proposed to be adduced must be sufficiently important to make it probable that a different verdict will be returned on a new trial. *Wiley v. People*, 449.

Newly Discovered Evidence—Affidavits. In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. *Id.*

Discretion of the Court. The disposal of a motion for a new trial, based on the ground of newly discovered evidence, is within the discretion of the trial court, and unless the discretion is abused, the ruling will not be disturbed on review. *Id.*

NONSUIT.

Conflicting Evidence. Where the evidence is in conflict on all issues raised by the pleadings, the questions are of fact for the jury. In such circumstances a motion for nonsuit should be denied. *Rocky Mt. Motor Co. v. Walker*, 53.

Where the evidence failed to support the case pleaded, a nonsuit was properly entered. *Sechrist v. Simm*, 101.

Final Judgment. Under rule 5 of this court, an unqualified judgment of nonsuit entered at the conclusion of plaintiff's testimony is as conclusive against him as though judgment for defendant had been entered after full trial. *Lehr v. Guild*, 349.

Res Adjudicata. An unqualified judgment of nonsuit rendered after full hearing of plaintiff's claim, is a judgment on the merits of the case, and is *res adjudicata* as to all matters involved in the transaction. *Id.*

NOTICE.

Deposition—Service. Under the provisions of section 414, code 1908, service on the attorney of record for the opposing party, of notice of application to take depositions, held sufficient, notwithstanding code section 383 provides for service of notice on "the other party." *Alamo Hotel Co. v. Toledo Co.*, 577.

OFFICERS.

Void Legislation. Attempt by the legislature in an appropriation bill to legislate one out of office and put another in, held void as being in contravention of article 5, section 32, article 5, section 21, and the civil service amendment of the Constitution. *People, ex rel. v. O'Ryan*, 69.

Mandamus. Mandamus lies to compel a bonded public officer to do his duty. *Stong v. Industrial Com.*, 133.

Sheriff—Service of Process—Sheriff Disqualified. Section 1299, R. S. 1908, relating to disqualification of the sheriff and performance of his duties by the coroner, held to apply to criminal as well as civil proceedings. *Kelliher v. People*, 202.

OPTION.

Conveyance of Interest in Property. The owner of an undivided interest in a mining lease and option is not entitled to the conveyance of an interest in the property on a tender of his proportionate share of the purchase price, the option being for a sale of the entire property. *Callahan v. Fraser*, 83.

ORPHAN'S ALLOWANCE.

Statute of Foreign State not Controlling. Where a resident of New Mexico died leaving minor children in Colorado, where he owned a tract of land, the children were entitled to orphans' allowances under the laws of Colorado, which are controlling on the question, rather than the statutes of the foreign state. *De Quintana v. Madril*, 123.

Priority of Claim. A claim for an orphan's allowance is not a claim under the law of descents and distribution; the allowance is not an interest in the estate; it is a preferred claim and first charge upon decedent's property in the state, and is given priority over claims of general creditors. *Id.*

PARTIES.

Deceased Defendant—Personal Representative. While the personal representative of a deceased obligor cannot be joined with the survivor as a defendant in an action at law on a contract, the rule does not apply in a case where the deceased defendant is living at the time of the institution of the action. Upon his death, his personal representative may be substituted as a party under the provisions of section 15, code 1908. *First Nat. Bank v. Riley*, 372.

PERPETUITIES.

Charitable Bequest—Condition Subsequent. A charitable be-

quest to a municipality is not void under the rule against perpetuities. The fact that to the bequest is attached a condition subsequent does not make the rule against perpetuities applicable. *Clarion v. Central Co.*, 482.

PERSONAL INJURIES.

Negligence—Directed Verdict. Evidence in a personal injury case reviewed, and the action of the court in directing a verdict for defendant, on the ground that there was no negligence shown, and that there was contributory negligence, upheld. *Kline v. Smith*, 362.

PERSONAL PROPERTY.

Conversion—Demand. In an action for the conversion of personal property, a demand is not a necessary prerequisite, where the surrounding facts and circumstances show that it would have been unavailing. *Longmont Farmers' M. & E. Co. v. Mulvaney*, 215.

Joint Tenancy. Joint tenancies with the incident of survivorship, obtain as to personal property. *Miller v. American B. & T. Co.*, 346.

PLEADING.

Unlawful Detainer—Replication. Our unlawful detainer act makes no provision for a replication, and the necessity therefor has been excluded. *Weir v. Welch*, 66.

Cause of Action. In an action against the officers and directors of a corporation to make them personally responsible for a debt of the company, the contention that the complaint does not show that the debt was originally contracted within the statutory period, held untenable in the case under consideration. *International State Bank v. McGlashan*, 72.

Amendment—Limitations. An amendment to a complaint which sets up no new cause of action, but simply perfects one already stated, relates back to the time of the commencement of the action and the running of the statute of limitations against the cause of action so pleaded is arrested at that time. *Id.*

Amendment. A plaintiff who is permitted to amend his complaint "to conform with the proof", cannot complain of a judgment for damages which gives him the amount asked by the amendment. *West Elk L. & L. Co. v. Telck*, 79.

Amendment—Dismissal. Demurrer to a complaint being sustained, plaintiff was given twenty days to amend and make a tender of the alleged purchase price of an interest in property. Failing to amend and make the tender, the action was properly dismissed. *Callahan v. Fraser*, 83.

Allegations of Title. An allegation of ownership in fee in one party, negatives record title in someone else; and a denial of every title whatsoever, is a denial of record title. *Leach v. Torbert*, 85.

Causes of Action—Separation. Record reviewed and held, that a motion to separately state alleged different causes of action in

a petition in intervention for the dissolution of a receivership was properly overruled. *Western Acceptance Co. v. Simmons Co.*, 127.

Fraudulent Conveyance—Cause of Action. Allegations of a complaint to set aside alleged fraudulent conveyances reviewed and held to state but one cause of action. *Gwillim v. Asher*, 143.

Conclusions. Where sufficient facts are set out in a complaint to state a cause of action, allegations of conclusions may be treated as surplusage. *Id.*

Allegations of a complaint to set aside alleged fraudulent conveyances reviewed and held sufficient. *Id.*

Departure. A complaint alleged that the plaintiff was the owner of an interest in real property; held, that this was not an allegation of fee title, but was consistent with an allegation of equitable title set up in the replication, which did not constitute a departure. *Foster v. Coffey*, 171.

Cause of Action. A pleading which sets up but one primary right and the violation thereof, states but one cause of action. *Steele v. McComb*, 190.

Practice. A motion to separately state causes of action was granted, and plaintiffs given five days within which to elect. Held, that it was error for the court to refuse permission to file an amended complaint stating but one cause of action, which was tendered within the five days. *Id.*

Quo Warranto—Answer. Allegations of an answer in an action to test the validity of the organization of an irrigation district reviewed, and held to state a defense. *Lockard v. People, ex rel.*, 213.

Complaint—Reply—Departure. Where a complaint was for recovery on *quantum meruit*, and the replication admitted that a part of the material furnished and work performed, was under the terms of an express contract set out in the answer, there was no departure. *Wallace Plumbing Co. v. Dillon*, 224.

Counterclaim. A counterclaim, in so far as its consistency is concerned, is a complaint, and is to be tested as to this question, by the same rules as complaints are tested. *Peppers v. Metzler*, 234.

Answer. Pleadings reviewed, and held, that the answer contained no denial of the allegations of the complaint, and that the affirmative matters pleaded, constituted no defense. *Russell v. Cripple Creek Bank*, 238.

Complaint. Allegations of a complaint in an action to restrain the inclusion of lands in a proposed drainage district, reviewed and held not subject to a general demurrer. *Coates v. Commissioners*, 241.

Special Damages. Where the libel is not one *per se*, the plaintiff must allege special damages. *Coulter v. Barnes*, 243.

Equitable Action. Pleadings in an action for the sale and distribution of the proceeds of a trust estate reviewed and held to state a matter for the equitable cognizance of the court in the

administration of a trust, and not subject to general demurrer. *Stuart v. Chaney*, 279.

Amendments. Technical matters contained in pleadings may be corrected by amendment if necessary. *Id.*

Complaint. Allegations of a complaint in a suit brought to compel the payment of bank deposits, reviewed and held to state a cause of action. *Miller v. American B. & T. Co.*, 346.

Limitation. In a proceeding to restrain the enforcement of an execution issued upon a judgment upon which an action is barred by the statute of limitations, an allegation of the bar of the statute is sufficient as against a general demurrer. *Sundin v. Frost*, 367.

Form—Name. The demands set out in a pleading are not to be defeated by mere mis-nomer or bad form. *Elkison v. Young*, 385.

Amendment. Under sections 79 and 81, code of 1908, a party after demurrer sustained to his complaint, has a right to amend without leave. *Barnard v. Moore*, 401.

Estoppel. One relying upon estoppel must plead it. *Sigel-Campion Co. v. Ardohain*, 410.

Ultimate Fact. The allegation that a certain street is a public highway, is an ultimate fact, like an allegation of ownership. *Gromer v. Papke*, 440.

General Denial—Evidence. A complaint alleged that a certain street was a public highway. Under a general denial, the introduction of any evidence tending to disprove the allegation was competent, and it was error to exclude a deed showing the street had been vacated, on the ground that the vacation had not been pleaded. *Id.*

Demurrer. Allegations of a complaint in an action to set aside a certificate of purchase and sheriff's deed and for a decree of title in plaintiff, reviewed, and held not subject to a demurrer on the grounds of improper joinder of parties defendant and want of facts. *Lippert v. Wright*, 462.

Superfluous Stricken. After complaint, answer and reply, defendant filed what he denominated a "Further Answer and Replication." Held, that this pleading was superfluous and should have been stricken. *Phares v. Don Carlos*, 508.

Failure to Reply—Admission. Pleadings reviewed and held, that the allegation in the answer of want of service or appearance, was a plea in confession and avoidance, and was admitted by failure to reply. *Hammitt v. Porter*, 511.

Estoppel—Evidence. Pleading and evidence reviewed, and held, that a plea of estoppel was in good form, and sustained by the uncontradicted evidence. *Alamo Hotel Co. v. Toledo Co.*, 577.

Amendment. Amendments in the furtherance of justice are always looked upon with favor, and in the case under consideration it is held there was no error in permitting plaintiff to amend his reply at the close of the trial, by adding a plea of estoppel. *Id.*

PRACTICE.

Pleading. A motion to separately state causes of action was granted, and plaintiffs given five days within which to elect. Held, that it was error for the court to refuse permission to file an amended complaint stating but one cause of action, which was tendered within the five days. *Steere v. McComb*, 190.

Petition. A petition or motion filed in a cause is sufficient to bring the matter before the court. *McClellan v. Morris*, 304.

PRINCIPAL AND AGENT.

Unauthorized Acts—Ratification—Burden of Proof. The burden of proving ratification of an agent's unauthorized acts rests on the party asserting it; but where an agent makes an unauthorized contract, and knowledge that he has done so is brought home to his principal who thereupon ratifies a portion of the contract and accepts the proceeds thereof, the burden rests upon the principal to show that he had no knowledge of the unratified portion, and that such lack of knowledge was not due to want of diligence. *National Bank v. Wildman*, 247.

Ratification in Part. A principal may not affirm a portion of an unauthorized contract, and disaffirm the remainder. *Id.*

Contract—Damages. An unauthorized agreement made by an agent is not ground for the recovery of the benefits which would have been derived from the contract if it had been performed. *Flora v. Hoeft*, 273.

Scope of Agency. An offer by a farm manager of a special inducement to one of his hands to enter the military service, is not within the scope of his agency, and in the absence of ratification is not binding upon the principal. *Troutman v. Sheridan*, 289.

Ratification. The contention that there was any agency and a ratification of the acts of the alleged agent by the principal under the facts of this case, overruled. *Mandy v. Hibbard*, 296.

Scope of Authority. A principal may confer such authority on his agent as he desires, and impose such limitations and restrictions as he may deem proper, and these are binding upon third persons with notice, if not waived by the principal. *McClellan v. Morris*, 304.

If the limitation of the agent's authority is known to the person with whom he deals, the principal will not be bound if the agent exceeds his authority. *Id.*

Duty of Agent. It is implied in every agency, in the absence of express evidence to the contrary, that the power of the agent is to be exercised for the benefit of the principal and not for his own private advantage. *Id.*

Agency. One having possession of negotiable paper has prima facie title thereto; but that title may be defeated or overcome by evidence that the note is held as an agent. *Id.*

If the agency permits the agent to receive the proceeds without limitations as to their application, one taking the note need not follow the proceeds; but if the agency of the party is made to appear,

the principal will not be bound beyond the authority given. *Id.*

Where the holder has notice that the party acting as agent is such, he is bound to inquire into his authority. *Id.*

Ratification. If a principal with full knowledge of all the material facts, takes and retains the benefits of an unauthorized act of an agent, he thereby ratifies such act; but the evidence must be sufficient to establish the facts necessary to show ratification. *Watson v. Woodley*, 391.

Implied—Estoppel. An implied agency is real but not apparent; agency by estoppel is apparent but not real. *Sigel-Campion Co. v. Ardohain*, 410.

Agency, How Established. One dealing with an agent must show actual authority, or apparent authority, relying upon appearances and the doctrine of estoppel. *Id.*

A principal may bind himself by causing others to believe the agent's authority to be greater than actually exists, but such acts of the principal must be known to and proved by the party relying thereon. *Id.*

Evidence. Facts reviewed and held not to establish agency. *Id.*

Agency—Burden of Proof. The burden of establishing agency is upon the party alleging it. *Larsen v. Whitford*, 437.

Record reviewed, and held, that the trial court correctly determined the question in the case under consideration. *Id.*

Real Estate—Authority of Agent. The authority of an agent to execute a contract for the sale of land must be in writing, and he must be given the power to do that which he assumes to do. *Crumley v. Shelton*, 466.

Ratification. Where a husband gave a lease and option on land belonging to his wife, without written authority, and she thereafter accepted as interest, payments made thereunder, that constituted a ratification of the contract on her part. *Simpson v. Nelson*, 490.

Agent's Authority. One who deals with an agent is, by the knowledge of the agency, put upon inquiry as to the agent's authority, and he accepts the agent's statements of such authority at his peril. *Canon City Co. v. McInerney*, 492.

Contract—Statements of Agent. One who signs a contract containing the statement, that no agent is authorized to change, add to, or detract therefrom, is bound thereby, and he cannot defend an action on the contract, on the ground that he trusted, and relied upon representations of the agent, because of his long acquaintance with him and belief in his integrity. *Id.*

Authority of Agent. Evidence to support an alleged counterclaim based on indebtedness contracted by an agent, was properly excluded, where there was no showing that the agent was authorized to incur such indebtedness. *Alamo Hotel Co. v. Toledo Co.*, 577.

PRINCIPAL AND SURETY.

Liability of Surety. A surety cannot be bound on a contract radically different from that, to secure the execution of which, it

has executed a bond, where the new contract is made without its knowledge or consent. *Empson v. Aetna Co.*, 282.

PROBATE LAW.

Widow's Allowance. The purpose of the allowance is to provide for the comfort and sustenance of the widow and children pending administration and before distribution. *Bubser v. Herrmann*, 95.

Widow's Allowance—Widow Residing Outside of State. A widow who has lived apart from her husband for three years, and is residing outside of the state and maintaining herself at the time of his death, which occurred in this state, is not entitled to a widow's allowance under our statutes. *Id.*

Widow—Domicile—Statutory Construction. Under our statutes regarding widow's allowance, the residence of a widow may be elsewhere than the state of her husband's domicile at the time of his death. *Id.*

Orphan's Allowance—Statute of Foreign State not Controlling. Where a resident of New Mexico died leaving minor children in Colorado, where he owned a tract of land, the children were entitled to orphans' allowances under the laws of Colorado, which are controlling on the question, rather than the statutes of the foreign state. *De Quintana v. Madrid*, 123.

Orphan's Allowance—Priority of Claim. A claim for an orphan's allowance is not a claim under the law of descents and distribution; the allowance is not an interest in the estate; it is a preferred claim and first charge upon decedent's property in the state, and is given priority over claims of general creditors. *Id.*

County Court—Jurisdiction. County courts are courts of record having general jurisdiction which is unlimited in the determination of matters growing out of the settlements of estates. *Glen v. Mitchell*, 394.

Power to Revoke Probate of Will. The county court as a court of probate, may, on proper grounds, revoke the probate of a will. *Id.*

Judgments—Final—Review. An order of the county court: "That petitioner be allowed to withdraw her claim as prayed in the petition", is not a final judgment and not subject to review on writ of error. *Roberts v. Strong*, 414.

Estate—Compromise of Desperate Claim. Facts reviewed and held, that the county court should exercise its discretion in passing upon a petition to compromise an alleged desperate claim owing the estate of an insane person. *Darrow v. Rohrer*, 417.

PROHIBITION.

Writ—When Granted. Where the complaining party has no adequate and speedy remedy against the unwarranted action of a trial court except prohibition, the peremptory writ will be granted. *People, ex rel. v. District Court*, 390.

PUBLIC FUNDS.

State Treasurer. Constitutional provisions giving the state treasurer control over state money, have no application to a special fund, not a part of the general revenues of the state, and of which the treasurer is custodian only, e. g., the state compensation insurance fund. *Stong v. Industrial Com.*, 133.

PUBLIC LANDS.

Homestead Entry by Minor. Though a homestead entry made by one under the disability of infancy and not the head of a family is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim. *Huff v. Geis*, 7.

REAL PROPERTY.

Deed a Mortgage. A husband conveyed land to his wife with the agreement on her part that she would at any time on his request, convey or mortgage it to raise money for use in his business. Under this agreement she executed a warranty deed to secure a loan to him. *Held*, that on payment of the debt so secured, the property should be conveyed to her heirs, she having died in the meantime. *Thomas Realty Co. v. Guthrie*, 98.

Statute of Frauds—Oral Conveyance of Land. An oral agreement to convey land is void under the statute of frauds. *Id.*

Conveyance—Omission of Reservation. Where a conveyance of town property omits one of the reservations contained in the original plat and dedication, the omission must be construed to have been intentional. *Burt v. Rocky Mt. Fuel Co.*, 205.

Contract Construed. Contract between parties claiming an interest in land, in which "each consents with the other to be equal owners of said land", construed to be a conveyance each to the other of one half of his or her interest, and based on a good consideration. *Scott v. Brown*, 275.

Conveyance. No particular form of words or formality is necessary to pass the title to real estate. *Id.*

Fraud. Record reviewed and the transaction, concerning real property, held fraudulent and collusive on the part of defendants, and the decree entered in favor of plaintiff upheld. *Scott v. Gregory*, 300.

Breach of Warranty—Encumbrances. As a general rule, in an action of covenant for breach of warranty against encumbrances, a knowledge of the encumbrance on the part of the vendee does not constitute a defense; but when it appears that the vendee has assumed the removal of such encumbrance, the rule does not apply. *McClellan v. Morris*, 304.

Title—Possession and Payment of Taxes. Exclusive possession of land under color of title and payment of taxes for seven consecutive years constitutes a good title. *Whitehead v. Dessertich*, 327.

Color of Title—Tax Deed. A deed purporting to convey title may be defective, convey no title, and yet give color of title. *Id.*

Action for Breach of Warranty—Possession. Under the provisions of section 679, R. S. 1908, before a grantee in possession can maintain an action against a grantor for breach of warranty, there must be a legal proceeding to obtain possession of the premises, notice to the grantor, and a refusal on his part to defend. *Ernst v. St. Clair*, 353.

This rule applies where the state holds title to the premises. *Id.*

Suit on Covenant—Paramount Title. A surrender to the paramount title will not, in Colorado, support a suit on a covenant of warranty or for quiet enjoyment. *Id.*

Power to Transfer under Will. A testator devised to his wife a life estate in land with remainder to his children, giving the wife power "to sell said place". *Held*, that this gave her power to sell the fee. *Barnard v. Moore*, 401.

Rights and Remedies—Cause of Action. Where a party can only assert an equitable title to real property, though his interest may be full and complete, he may, though out of possession, have his equitable remedy, and may unite with it any appropriate cause of action through which he may secure full and adequate relief. *Lipbert v. Wright*, 462.

Quieting Title—Possession. One not in possession of real estate may not maintain an action to quiet title thereto. *Book v. Book*, 502.

Contract Construed. Property was sold under a trust deed and the debtor permitted to redeem by making certain payments within a limited time, which was later extended for twenty days. He made but one payment of \$5000. *Held*, that the contract for redemption was equivalent to an option to buy real estate; that when a payment was made under it and an extension of time given on the balance, it became a contract of sale, and that time was of the essence of the option and contract as extended. *Phares v. Don Carlos*, 508.

RECEIVERS.

Appointment—Discretionary. Whether a receiver will or will not be appointed, is a question which ordinarily rests in the sound discretion of the court, and the exercise of that discretion will not be interfered with save in a clear case of abuse. *Western Acceptance Co. v. Simmons Co.*, 127.

Appointment—Waiver by Defendant—Interveners. While a defendant may waive certain requirements for the appointment of a receiver, such waiver does not bind an intervener in the action. *Id.*

Collusion in Appointment—Discharge. Where subsequent to the appointment of a receiver, it was made to appear to the court that the receivership was procured by collusion between the debtor, which was solvent, and one of its creditors, for the purpose of enabling the debtor to continue its business under the same management, without being disturbed by its other creditors, the receivership was properly dissolved. *Id.*

REMEDIES.

Election. A remedy based on the theory of the affirmance of a contract, is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance or rescission, so that the election of either is an abandonment of the other. *Lehr v. Guild*, 349.

Real Property—Cause of Action. Where a party can only assert an equitable title to real property, though his interest may be full and complete, he may, though out of possession, have his equitable remedy, and may unite with it any appropriate cause of action through which he may secure full and adequate relief. *Lippert v. Wright*, 462.

RES ADJUDICATA.

Different Character of Action. A question having been once litigated and determined may not again be contested in a future action between the same parties merely because the action is of a different character. *Croke v. Farmers Co.*, 514.

If the matter in question is controverted by the pleadings, it will be conclusively presumed to have been litigated. *Id.*

RULES.

Supreme Court, XIX.

Supreme Court—Rehearings. Rule 47 of the Supreme Court concerning petitions for rehearings, discussed. *Book v. Bock*, 502.

SCHOOLS.

Bonds—Excessive Issue. Where a school district may become indebted in a certain amount by bonds, and the electors of the district authorize a debt in excess of that amount, such authorization is void only as to the excess, and valid as to the sum which it was within the power of the district to issue. *Shover v. Buford*, 562.

SPECIFIC PERFORMANCE.

Indefinite Contract. Where a contract of option provided a consideration for 600 acres of a 950 acre tract, with no consideration expressed for the balance, it was void as to the 350 acres, under the statute of frauds, section 2662, R. S. 1908. *Blackman v. Pring*, 13.

Entire Contract to be Enforced. The general rule, applicable to this case is, that a contract to be specifically enforceable must be such as can be enforced in its entirety. A partial enforcement will not suffice. *Id.*

Contract Must be Definite. To justify a decree of specific performance, the contract sought to be enforced must be reasonably certain and definite. *Crumley v. Shelton*, 466.

Mortgage on Property Involved—Effect. The fact that land, upon a part of which a lease and option is given, is covered by a mortgage, will not prevent the enforcement of the contract. It is

the business of the person giving the option to clear the title. *Simpson v. Nelson*, 490.

STATE COMPENSATION INSURANCE FUND.

Control—Investment. The industrial commission has full control of the fund, and nothing is required of the state treasurer but to obey the instructions of the commission as to the investment thereof, under the statute. *Stong v. Industrial Com.*, 133.

Public Funds—State Treasurer. Constitutional provisions giving the state treasurer control over state money, have no application to a special fund, not a part of the general revenues of the state, and of which the treasurer is custodian only, e. g., the state compensation insurance fund. *Id.*

STATUTES.

Continuing Appropriation. An act providing that an official shall be paid an annual salary, to be paid in the same manner as expenditures of the executive department are paid, construed to be a continuing appropriation for the payment of such salary. *People, ex rel. v. O'Ryan*, 69.

The effect of a continuing appropriation is the same as if the appropriation had been written in the appropriation bill. *Id.*

Construction. A statute which gives the power to direct, also imposes the duty on the one directed to obey. *Stong v. Industrial Com.*, 133.

Statutory Construction—Service of Process—Sheriff Disqualified. Section 1299, R. S. 1908, relating to disqualification of the sheriff and performance of his duties by the coroner, held to apply to criminal as well as civil proceedings. *Kelliher v. People*, 202.

Construction. Section 7096, R. S. 1908, regarding the probate of wills, involves no question of jurisdiction, it is merely regulatory. *Glenn v. Mitchell*, 394.

Limitation—Construction. Section 7096, R. S. 1908, concerning the probate of wills and conclusiveness thereof, construed, and held not to bar an action, commenced after the one year period, to vacate an order admitting a will to probate, it being alleged that the execution of the will was induced by fraud and misrepresentation. *Id.*

Interpretation—"Or"—"And." In the interpretation of a statute, courts may, in order to carry out the intention of the legislature, substitute "and" for "or." *Henrie v. Greenlees*, 528.

From Other States—Decisions. Where a Colorado statute is copied from the laws of another state, its appellate decisions relative thereto, existing at the time, will be controlling on Colorado courts. *Warner v. People*, 559.

STATUTE OF FRAUDS.

Oral Conveyance of Land. An oral agreement to convey land is void under the statute of frauds. *Thomas Realty Co. v. Guthrie*, 98.

Option by Agent. In the absence of written authority from a

wife, the owner of real property, to her husband, authorizing it, a lease and option given by him on a part of the land was void under the statute of frauds. *Simpson v. Nelson*, 490.

SUBROGATION.

Doctrine. The doctrine of subrogation is one of equity and benevolence, and its object is the prevention of injustice. *Scott v. Gregory*, 300.

The doctrine held applicable to the case under consideration. *Id.*

SUPREME COURT.

Rules, XIX.

Rehearings Rule 47 of the Supreme Court concerning petitions for rehearings, discussed. *Book v. Book*, 502.

Jurisdiction. Where, in accordance with the provisions of section 6, chapter 6, S. L. 1911, a stay is granted by the Supreme Court on the essential condition of payment of any damages suffered by the defendant in error thereby, the court has power to assess the damages occasioned by the stay and to enter an order for the payment thereof. *Weir v. Welch*, 568.

TAXES AND TAXATION.

Real Estate Mortgages. Section 5542, R. S. 1908, concerning assessment of real estate mortgages, is not unconstitutional as exempting property from taxation. Taxing real estate and a mortgage on the property, separately, constitutes a double taxation, and the statute providing they shall be assessed as a unit, and that the notes and mortgage shall not be otherwise returned or assessed, does not exempt the mortgage from taxation. *Washington County v. Murray*, 522.

Deed Application for—Notice. Under the provisions of section 5727, R. S. 1908, it is not necessary to publish notice of application for a tax deed, where all interested parties have been served with actual notice thereof. *Henrie v. Greenlees*, 528.

Sale—Purchase by County—Deed. A tax deed which shows on its face that the property was bid in by the county the first day it was exposed for sale, may be held void, but the facts do not make the rule applicable to the case under consideration. *Id.*

Sale—Payment of Subsequent Taxes. Under section 5726, R. S. 1908, the purchaser of a tax sale certificate from the county is required to pay the taxes assessed since the date of the sale, or such sum as the commissioners may decide. *Held*, that there was a compliance with this requirement where the holder of such a certificate purchased the tax sale certificates thereafter issued on the property. *Id.*

TRADE NAME.

Affidavit. An individual doing business under a trade name, must file an affidavit in compliance with the provisions of section 4778, R. S. 1908, before he can prosecute a suit for the collection of a debt; but it is not necessary that the affidavit be recorded. *Wallace Plumbing Co. v. Dillon*, 224.

Affidavit in the instant case held insufficient. *Id.*

TRIAL.

Remarks of Judge—Findings. Remarks of the court during a trial are not findings, properly so called. *Soule v. Kunkle*, 221.

Causes of Action—Election. When a complaining party seeks to rescind a contract because of fraud, and to recover damages; and also at the same time to affirm the contract and recover damages for a breach thereof, the failure of the court to direct an election, upon motion, is reversible error. *Peppers v. Metzler*, 234.

Erroneous Theory—Objections. If a case is tried upon a theory to which counsel has made proper objection, the fact that he requested instructions which he deemed necessary for the protection of the interests of his client, does not preclude him from urging that the court erred in overruling his objections to the admission of evidence, or other action in accordance with the theory to which he objects. *Western L. S. L. Co. v. Creaghe*, 334.

TRUSTS.

Equity. The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity. *Stuart v. Chaney*, 279.

Trustees—Personal Claim. A trustee whose duty it is to sell, has no right to set up a personal claim, nor a breach of a contract between himself and others, as a reason for not performing his duty. *Id.*

Constructive. Parents—just before the father's death—conveyed to their daughters all their property. In an action between the daughters concerning the estate, in which the mother intervened asking that a trust be declared in her favor, it is held: That it would require strong evidence to prove that the father and mother denuded themselves of all their property by deed to their daughters without an understanding of some kind, e. g., that they were to be supported out of the income; and in view of the confidential relations between the parties, that must be said to be sufficient to create a constructive trust. *Vosburg v. Knight*, 473.

Beneficiaries—Interest. The beneficiary in every trust has an interest sufficient to enable him to be a party in an action in relation thereto. Where a town is the beneficiary, it may prosecute a writ of error as trustee for its citizens. *Clarion v. Central Co.*, 482.

TRUST DEED.

Foreclosure—Redemption by Judgment Creditor. The term "judgment creditor", as used in section 2, chapter 112, S. L. 1917, concerning redemption of land from foreclosure sale by a judgment creditor, means judgment creditor of the person whose land shall be sold under execution. The statute refers only to creditors having judgments or decrees capable of enforcement by sale of the land to be redeemed. *Leach v. Torbert*, 85.

VERDICT.

Directed—Conflicting Testimony. Where there is a substantial

conflict of testimony upon the matter at issue, and the record shows that a verdict for defendant would not have been manifestly against the evidence, it is error to direct a verdict for plaintiff. *General Accident Co. v. Cohen*, 23.

Directed. Where there was no evidence to support a counter-claim or pleaded defense, it was proper for the court to direct a verdict for plaintiff. *Alamo Hotel Co. v. Toledo Co.*, 577.

WAIVER.

Contract. Waiver is a question of fact to be established by proof. It may be shown by express declarations; or by the party so neglecting to act as to induce a belief that there is an intention to waive; or by a course of acts and conduct which amounts to an estoppel. *Wishered v. Noonan*, 218.

WATER RIGHTS.

Water Officials—Duties—Power of Courts. Water officials must distribute water according to decreed priorities, and a court has no power to direct them to do that which the duties of their office does not require of them. *Ft. Morgan Co. v. McCune*, 256.

Seepage Water—Appropriation. Water escaping from a reservoir or a ditch, underground, and becoming percolating water which will naturally reach a public stream, must be regarded as a part of the stream; it belongs to the appropriators in the order of their priorities when needed, and cannot be made the subject of a direct appropriation. *Id.*

Conveyance. A deed conveying water rights appurtenant to described land, does not include a reservoir not mentioned, which is not located on the property conveyed, and which was not part of the grantor's irrigation system or rights. *Koblian v. Dzuris*, 339.

Injunction—Decree. In a suit to restrain interference with the use of water and irrigation works, it is error to grant an injunction without definite findings as to the rights of the parties. *Id.*

Decree—Essentials of. A decree should fix with definiteness the rights and liabilities of the parties, and failing to do so, is erroneous and may be void. *Koblian v. Dzuris*, 339.

Change of Point of Diversion—Evidence. In an action for a change of the point of diversion, evidence of the limited time of use of the water, acreage irrigated, and location of the irrigated lands with reference to the stream, held competent. *Hochne Ditch Co. v. Martinez*, 428.

Decree—Evidence. While an adjudication decree may not be modified after the time fixed by statute for questioning it, yet into every decree must be read a provision that it does not authorize waste or excessive use; and while the issue of abandonment may not be tried in a proceeding to change the point of diversion, the question of the use or non-use of the water sought to be transferred, may be considered. *Id.*

Findings Not Supported by Evidence. Evidence in a proceeding for change of the point of diversion of decreed water reviewed and

held not to support the finding of the court that the **proposed change** would not injuriously affect the vested rights of **other appropriators** on the stream. *Id.*

Change of Point of Diversion—Burden of Proof. In an action for the change of point of diversion, the burden of proving that no injury to other appropriators would follow the proposed change, is upon petitioner. *Id.*

Quieting Title—Mandamus. A perpetual water right may not be secured, nor title thereto quieted in an action in mandamus. *Croke v. Farmers Co.*, 514.

WIDOW'S ALLOWANCE.

The purpose of the allowance is to provide for the comfort and sustenance of the widow and children pending administration and before distribution. *Bubser v. Herrmann*, 95.

Widow Residing Outside of State. A widow who has lived apart from her husband for three years, and is residing outside of the state and maintaining herself at the time of his death, which occurred in this state, is not entitled to a widow's allowance under our statutes. *Id.*

Widow—Domicile—Statutory Construction. Under our statutes regarding widow's allowance, the residence of a widow may be elsewhere than the state of her husband's domicile at the time of his death. *Id.*

WILLS.

Real Property—Quitclaim Deed. A husband devised to his wife a life estate in land with power to sell. *Held*, that the power to convey created in her no right, title or interest in the premises, and that a quitclaim deed granting all her right, title and interest, without reference to her authority to transfer the fee, conveyed her life estate and no more. *Barnard v. Moore*, 401.

Property—Title. A testator devised to his widow a life estate in land, with power to sell, and remainder to his children "in fee simple", with the condition that if any child should die before the widow, his share should pass to his heirs. The widow quitclaimed her interest to the children, one of whom thereafter conveyed his interest and then died. A daughter of the deceased son made a claim to his interest. *Held*, that the interest was a fee simple subject to a conditional limitation, which terminated with the death of the son and let in the right of the daughter, who would take by virtue of the will and not by descent; that neither the deed of the widow nor that of the father passed her right, and that she had a vested interest in the land. *Id.*

Life Estate—Acceleration of Remainder. Where a husband devised to his wife a life estate in land and remainder to his children, a conveyance of the life estate did not accelerate the remainder. *Id.*

WITNESSES.

Competency—Suit by Heir. An adverse party may not testify in

an action brought by one to enforce his rights as an heir. *Thomas Realty Co. v. Guthrie*, 98.

Against Heirs or Representatives—Competency. In an action where one is defending as an heir or legal representative, a witness who is incompetent against the heir or representative, under the statute, may be competent to testify against other defendants in the action, who are not representatives or heirs. *Watson v. Woodley*, 391.

Competency. Record reviewed and held not to support the contention of plaintiffs in error that they were defending in a representative capacity as heirs, and that therefore defendant in error was an incompetent witness in her own behalf. *Berlin v. Wait*, 533.

WORDS AND PHRASES.

"*Suit.*" The word "suit" held to mean a criminal prosecution as well as a civil proceeding. *Kelliher v. People*, 202.

"*Legal Proceedings.*" "*Action.*" The words "legal proceedings", and "action", as used in section 679, R. S. 1908, mean a suit in court. *Ernst v. St. Clair*, 353.

"*Sell the place.*", means to sell the whole title. *Barnard v. Moore*, 401.

"*Desperate.*"—"Hope". "Desperate" means without hope. "Hope" denotes some degree of expectation. *Darrow v. Rohrer*, 417.

"*Legislate.*" To legislate, is the power to enact laws. *Travelers Ins. Co. v. Industrial Com.*, 495.

"*Law.*" A law is a rule of action prescribed by authority. *Id.*

"*Prescribe.*" To prescribe, means to dictate, to positively command. *Id.*

"*Construct.*" Where by contract a party was granted certain rights in connection with reservoirs which might thereafter be constructed, and at the time of the execution of the contract only surveys and filings had been made with no actual construction of reservoirs, it is held that the word "construct" should not be construed as in cases involving priorities of water rights where the right attaches at the date of beginning work, but should be given its usual and ordinary meaning. *McLeod v. Colo. Power Co.*, 518.

WORKMEN'S COMPENSATION.

Non-Resident Dependent—Limitation. Under the provisions of section 62, chapter 179, S. L. 1915, regarding workmen's compensation, if no written notice of the accident shall be given to the industrial commission by a non-resident claimant within one year, and no compensation is paid within that period, the claim is barred, unless for some sufficient reason the running of the statute is delayed or postponed. *Industrial Com. v. Peppas*, 25.

Industrial Commission—Petition for Review—Law Applicable. Under the provisions of section 98, chapter 210, S. L. 1919, applica-

tion to the industrial commission for a review of its findings and award is a prerequisite to the bringing of a court action to set aside such award. *Id.*

This section is remedial, and the law in force at the time of the ruling of the commission, is the one applicable to the claim under consideration. *Id.*

Appeal and Error. A writ of error which is not sued out within the time provided by section 106, chapter 210, S. L. 1919, regarding practice in workmen's compensation cases, will be dismissed on motion. *General Chemical Co. v. Thomas*, 28.

Procedure—Waiver. After original award by the industrial commission, on petition to reopen the case, of which employer and insurance carrier have notice, if they appear and participate in the further proceedings without objection, they will be deemed to have waived any question of the authority of the commission to enter an additional award. *Industrial Commission v. State Fund*, 106.

Loss of Vision. Where the vision of an employe, remaining after an accident arising out of and in the course of his employment, is not such as to enable him to perform his work, although he may be able to distinguish large objects and lights and shadows, he will be entitled to compensation for total disability within the meaning of the workmen's compensation act. *Id.*

Blindness in One Eye, Loss of Vision of the Other. Under the workmen's compensation act of 1915, an employe who has lost the vision of one eye, and subsequently loses the sight of the other as the result of an accident arising out of and in the course of his employment, is entitled to compensation for total permanent disability. *Id.*

Commission Findings of Fact Conclusive. The district court in an action to review an award of the industrial commission has no right to set aside or amend a finding of fact of the commission, and then order the award to be amended accordingly. *Industrial Commission v. General Acc. Co.*, 115.

Disability of Claimant—Determination. Where an employe sustained a loss of his right thumb, index and middle fingers and a partial loss of the use of the hand, under the provisions of the act of 1919, the industrial commission had the power to fix the disability on the basis of a partial loss of the use of the hand, rather than on the loss of the fingers. *Id.*

Double Compensation. The commission may not allow for loss of fingers and add compensation for the loss or partial loss of use of the hand. *Id.*

Burden of Proof. The burden of proof is upon the party asserting the claim, and he must show that the injury or death was the proximate result of an accident arising out of and in the course of employment. *Olson-Hall v. Industrial Com.*, 228.

Industrial Commission—Fact Findings. Fact findings of the industrial commission based upon conflicting testimony are conclusive on review. *Id.*

Evidence—Hearsay. The rule against hearsay evidence is vitally substantial, and may not properly be disregarded in proceedings under the workmen's compensation act. *Id.*

Evidence—Statements of Deceased Employee. Statements of a deceased employe as to his bodily or mental feelings are admissible in evidence; but those as to the cause of his illness, if not within the *res gestae* rule, are not admissible. *Id.*

Findings of Commission. On review of an industrial commission case, the appellate court may consider only the question of whether there is evidence to support the findings of the commission. The award is conclusive upon all matters of fact properly in dispute, where supported by evidence or reasonable inference to be drawn therefrom. *Empire Zinc Co. v. Industrial Com.*, 251.

Wife—Dependency. Under the provisions of section 52, chapter 210, S. L. 1919, a wife is presumed to be wholly dependent upon her husband for support, unless she be voluntarily separated, living apart from, and not dependent upon him in whole or in part, all three of which elements must be made to appear before the presumption of dependency can be overthrown. *Id.*

Dependency of Wife—Evidence. Evidence reviewed and held to support the findings of the commission that the claimant was not voluntarily separated or living apart from her husband at the time of his death, and that she was wholly dependent upon him for support. *Id.*

Industrial Commission—Findings. In a proceeding under the Workmen's Compensation act, it is the duty of the industrial commission to make sufficient specific findings of fact, and where it fails to do so, a cause which has been brought to the supreme court for review, will be remanded for further proceedings. *Crawford v. Industrial Com.*, 378.

Accident Arising out of and in the Course of Employment. An auto salesman, driving a machine belonging to his employer and returning to town after making a sale, was attacked and killed by persons whose purpose was to obtain the automobile in which he was riding. *Held*, that the industrial commission was justified in awarding compensation to his dependent widow, his death having been occasioned by an accident arising out of, and in the course of his employment. *Industrial Com. v. Pueblo Co.*, 424.

WRITS.

Search and Seizure—Subpœna Duces Tecum. Section 7, article II of the Constitution, providing security against unreasonable search and seizure, has no application to ordinary cases of the production of documents under a *subpœna duces tecum*. *Eykellboom v. People*, 318.

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